

1                   UNITED STATES BANKRUPTCY COURT  
2                   DISTRICT OF DELAWARE

3 IN RE: . Chapter 11  
4 LORDSTOWN MOTORS CORP. , . Case No. 23-10831 (MFW)  
et al., . (Jointly Administered)  
5 .  
6 . Courtroom No. 4  
Debtors. . 824 Market Street  
7 . Wilmington, Delaware 19801  
8 . . Monday, August 28, 2023  
..... 10:30 a.m.

9                   TRANSCRIPT OF ZOOM HEARING  
10                  BEFORE THE HONORABLE MARY F. WALRATH  
11                  UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commence at 10:30 a.m.)

2 THE COURT: Okay. We can get started.

3 Good morning. This is Judge Walrath. We're here  
4 in the Lordstown Motors case. This is -- I think I will turn  
5 it over to counsel for the debtor just to run through the  
6 agenda, some matters are off.

7 MR. DEFRANCESCHI: Thank you, Your Honor. Dan  
8 DeFranceschi from Richards, Layton & Finger. We appreciate  
9 Your Honor's time today.

10 If it pleases the Court, what I'd like to do is  
11 hand it off to Mr. Zakia. He will be going up first. And  
12 also, of course, Mr. Lauria will be heavily involved in the  
13 hearing today.

14 THE COURT: All right. Thank you.

15 MR. ZAKIA: Good morning, Your Honor. Jason Zakia  
16 of White & Case for the debtors.

17 Your Honor -- and it is with gratitude that I say  
18 I think Your Honor stole my thunder with regard to Item  
19 Number 1 on the agenda, which was the Karma settlement. I --  
20 if I am not mistaken, that order was entered by the Court a  
21 few moments ago. And for that, we are grateful.

22 So I guess we can dispense with -- unless Your  
23 Honor had any issues with regard to that, we can dispense  
24 with Matter 1.

25 THE COURT: No, I have no questions.

1 MR. ZAKIA: Thank you very much, Your Honor.

2 And so then the remaining item on the agenda is  
3 Foxconn's motion to dismiss or convert the cases.

4 THE COURT: Okay.

5 MR. ZAKIA: So I guess, at this point, I will cede  
6 the virtual podium to counsel for Foxconn.

7 THE COURT: Thank you.

8 UNIDENTIFIED: (Indiscernible)

9 MR. MICHELI: Good morning. Matthew Micheli of  
10 Paul Hastings on behalf of Foxconn.

11 The second matter on the agenda is Foxconn's  
12 motion to limit notice of service of the motion to dismiss.  
13 That motion appears at Docket Number 278.

14 Your Honor, as we set forth in our motion, this  
15 matter was set for a hearing on August 15th, approximately 13  
16 days ago.

17 The debtors' credit matrix is inclusive of  
18 approximately 5,500 parties and there are more than 100,000  
19 equity holders in the case. Of the 100,000 plus equity  
20 holders, 23,000 of those parties require hard copy service.  
21 And in speaking with KCC, we determined that it would likely  
22 take several weeks to complete that service.

23 That paper service would go through first  
24 Broadridge. Broadridge would then either directly serve  
25 certain equity holders or indirectly serve the remaining

1 equity holders through their nominees. And again, the  
2 expectation is, is that process would have taken several  
3 weeks at an extremely high cost. And so most of those 23,000  
4 parties would not have received notice by the time this  
5 hearing started.

6 Your Honor, so what we did to address appropriate  
7 service with respect to the motion is, on August 16th, we  
8 filed our notice of hearing on this motion to dismiss, which  
9 appeared at Docket Number 259. And then, through KCC, on  
10 August 16th, we served the creditor matrix. The certificate  
11 of service for that appears at Docket Number 327.

12 On August 17th, we completed electronic service on  
13 approximately 77,000 of the equity holders. Those -- it was  
14 all of the parties that did require paper service. And  
15 again, that certificate of service is set at Docket 327.

16 And then, Your Honor, to address the parties that  
17 required paper service, on August 21st, we published  
18 notification of the hearing in the New York Times. The  
19 affidavit of service for that was filed this morning, Your  
20 Honor, it appears at Docket Number 333.

21 In addition, Your Honor, we will note that, on  
22 August 14th, 2023, the debtors filed their Form 10-Q for the  
23 period ending on June 30th, 2023, and that 10-Q prominently  
24 discussed the pending motion to dismiss and provided parties  
25 the information to obtain additional documents related to the

1 motion to dismiss through the KCC website.

2                 Based upon that, Your Honor, we believe that  
3 service of the motion was adequate and appropriate under the  
4 circumstances. We are not aware of any objections that have  
5 been filed. And based upon that, we would request that the  
6 Court enter the order attached to the motion as Exhibit A.

7                 THE COURT: All right. Thank you.

8                 Does anyone wish to be heard on that motion?

9                 MR. LAURIA: Your Honor, good morning. This is  
10 Tom Lauria with White & Case, counsel for the debtors.

11                 I just wanted to confirm that the debtors do not  
12 object to the relief requested in that motion.

13                 THE COURT: All right. Thank you.

14                 MS. KOVSKY-APAP: Your Honor, Deb Kovsky of  
15 Troutman Pepper on behalf of the committee.

16                 The committee, likewise, does not object.

17                 THE COURT: All right. I think the alternative  
18 notice provided by the movant is appropriate and I will grant  
19 the motion then.

20                 MR. MICHELI: Thank you, Your Honor.

21                 At this point, I will turn it over to my colleague  
22 Matt Murphy.

23                 THE COURT: I think you're still muted,  
24 Mr. Murphy.

25                 MR. MURPHY: The double-mute got me again. Good

1 morning, Your Honor.

2 THE COURT: Good morning.

3 MR. MURPHY: I will quickly cede the virtual  
4 podium to our colleague Mike Whalen.

5 THE COURT: Thank you.

6 MR. WHALEN: And Your Honor, having received the  
7 hot potato, I'll address the motion to dismiss item.

8 I think the debtors and Foxconn have made  
9 substantial headway minimizing procedural issues which are  
10 everyone's favorite to argue about. But I think  
11 (indiscernible) cleared them all the way.

12 Your Honor will have received, through chambers  
13 and through Morris Nichols, an exhibit binder. I'm happy to  
14 say that the parties, as I understand it, have no objections  
15 to any of those being received into evidence, so that we can  
16 avoid any sort of evidentiary peccadilloes later. Those will  
17 all be submitted.

18 There are some confidentiality issues, as noted in  
19 the exhibit list. As we do it right now, those shouldn't  
20 pose any issue during the evidentiary portion of the hearing.  
21 There may arise an issue where we have to address briefly  
22 some confidentiality with respect to Exhibit 12. I think our  
23 preference is, when we get to that point, that we will just  
24 reference it, Your Honor has it, and we'll do everything we  
25 can to avoid having that bog down the hearing.

1                   THE COURT: Okay.

2                   MR. WHALEN: With respect to the conduct of the  
3 hearing, Foxconn and the debtors have agreed that we'll  
4 handle this just like a normal contested matter hearing,  
5 obviously subject to any of Your Honor's preferences. We'll  
6 do whatever Your Honor believes is best and most efficient.

7                   But we thought it would be most efficient to take  
8 evidence in the ordinary course right off the bat and then  
9 have summations/argument afterwards.

10                  With respect to the taking of evidence, it will be  
11 fairly standard, except my understanding is that the debtors  
12 wish to do live examination, so there will be no direct via  
13 declaration. And if Your Honor is comfortable with it, we  
14 will call two of the witnesses adversely and then the  
15 examination can be conducted by the debtors, subject then to  
16 any further cross, if that's amenable to Your Honor.

17                  THE COURT: That's fine.

18                  MR. WHALEN: Your Honor may have seen that there  
19 was a third witness on the witness list, Mr. Jeffrey Finger.  
20 We have agreed to offer his testimony to the Court via  
21 designation. He's the one exception with the declarations.  
22 His declaration will come in subject to the cross-  
23 examination, which will be done via designation. We are  
24 preparing that as we speak. It is in the queue of many  
25 things being rushed through this weekend. And we will have

1 it to your chambers we hope very, very shortly. But he will  
2 not have to testify live, I am sure to his great  
3 satisfaction.

4 THE COURT: Okay.

5 MR. WHALEN: And if there's anything I missed,  
6 I'll defer to Mr. Zakia. But I think that is it for the  
7 conduct of the hearing and preliminary matters.

8 MR. ZAKIA: So, Your Honor, Jason Zakia for the  
9 debtors.

10 I agree mostly with what Mr. Whalen stated, one  
11 caveat. While we do intend to question Mr. Ninivaggi and  
12 Mr. Hightower live in the manner that Mr. Whalen indicated;  
13 and so, therefore, the directs will not -- sorry -- the  
14 declarations will not serve as directs, I believe the parties  
15 have agreed, nevertheless, to streamline things, to the  
16 admission of those declarations, as reflected by the fact  
17 that those declarations are included on the agreed exhibit  
18 list that counsel submitted to the Court.

19 So, with that one caveat, I think he laid out our  
20 agreement correctly.

21 MS. KOVSKY-APAP: Your Honor, Deb Kovsky for the  
22 committee.

23 I don't believe the committee has received a copy  
24 of the exhibit binder for today's hearing and we would  
25 appreciate getting a copy of that as soon as possible.

1                   THE COURT: I might have not, either, so ...

2                   MR. TALMO: Good morning, Your Honor. Matt Talmo,  
3 Morris, Nichols, Arsh & Tunnell, on behalf of Foxconn.

4                   So we just saw the committee's email about the  
5 exhibit list. You know, as Mr. Whalen mentioned, you know,  
6 apologies, we were moving very fast this morning. I just  
7 forwarded that over to the committee, so the committee should  
8 have that.

9                   And for you, Your Honor, it was sent shortly  
10 before the hearing to Ms. Capp, so it may still be making its  
11 way through the internet tubes, but it was sent at around  
12 10:25, so --

13                  THE COURT: So you --

14                  MR. TALMO: -- if you don't have it --

15                  THE COURT: You sent it electronically?

16                  MR. TALMO: I did, Your Honor, yes.

17                  THE COURT: Okay. Let me check. She hasn't --  
18 let me see if she forwarded it. Not yet. When I get it,  
19 I'll let you know.

20                  MR. TALMO: Okay. Thank you.

21                  MR. WHALEN: And Your Honor, just briefly, if I  
22 may, on the declarations?

23                  THE COURT: Yes.

24                  MR. WHALEN: We have no issue with them coming in.  
25 I think just the normal caveats that you would hear in a

1 bench trial or a bench matter that we obviously take issue  
2 with certain representations therein. I don't think it's  
3 productive for the parties to be bogged down in parsing those  
4 declaration. But we trust that Your Honor will take them,  
5 again, subject to the weight of any cross-examination that is  
6 conducted. And you know, any evidentiary issues that might  
7 be present therein, Your Honor can adequately weigh as you  
8 see fit.

9                   THE COURT: All right. Thank you.

10                  MR. WHALEN: With that, we're ready to proceed,  
11 Your Honor. If it makes sense to wait briefly until you have  
12 the exhibits, but I don't know that that would materially  
13 delay examination. There may be one exhibit relevant to the  
14 examination of one of the witnesses. We can always show that  
15 on the screen because that is not subject to any  
16 confidentiality designation, if need be.

17                  THE COURT: Well, it looks like I have the joint  
18 exhibit list. But I don't have a ZIP drive of the actual  
19 exhibits.

20                  MR. TALMO: Your Honor, Matt Talmo again for the  
21 record.

22                  So we sent it via share filing because the file  
23 size of the exhibits was too large. If you would like, we  
24 could break it out piecemeal and send it as separate ZIP  
25 files, whatever Your Honor would prefer.

1           THE COURT: No, that's fine. I just found it. It  
2 was a different --

3           MR. TALMO: Okay.

4           THE COURT: -- different email.

5           MR. TALMO: Okay. Great.

6           THE COURT: All right. You may proceed then.

7           MR. WHALEN: Thank you, Your Honor.

8           For our first witness, Foxconn will call Mr. Dan  
9 Ninivaggi.

10          MR. ZAKIA: Can -- and I'm sorry. So I don't  
11 interrupt, I just want to make -- so the record is clear,  
12 Mr. Whalen. Are you going to put the exhibits in now?

13          MR. WHALEN: Yes. I would move to admit the  
14 exhibits if there is no objection, which I understand there  
15 not to be.

16          MR. ZAKIA: We do not object, Your Honor.

17          THE COURT: Okay. All right. Then they will be  
18 admitted.

19           (Certain exhibits received in evidence)

20          THE COURT: All right. Mr. Ninivaggi is the  
21 witness?

22          MR. WHALEN: Yes, Your Honor.

23          THE COURT: All right. I'm going to ask you to  
24 take the oath and I'll have my clerk administer it.

25          THE CLERK: Raise your right -- raise your right

1 hand. Do you affirm -- do you affirm --

2 THE COURT: Turn off your mic. Try it now.

3 DANIEL NINIVAGGI, MOVANT'S WITNESS, SWORN

4 THE CLERK: Please state your full name and spell  
5 your last name for the record.

6 THE WITNESS: It's Daniel Ninivaggi. My last name  
7 is spelled N-i-n-i-v-a-g-g-i.

8 THE COURT: All right. You may proceed,  
9 Mr. Whalen.

10 MR. WHALEN: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. WHALEN:

13 Q Good morning, Mr. Ninivaggi.

14 A Hi, Mr. Whalen. How are you?

15 Q Good. Good to see you again.

16 Mr. Ninivaggi, you are the chairman of the debtors,  
17 correct?

18 A Correct.

19 Q And you were formerly the debtors' CEO.

20 A Correct.

21 Q You joined the debtors in August of 2021. Is that  
22 right?

23 A That's right.

24 Q You moved from the CEO role to the executive chairman  
25 role around July of 2022, correct?

1 A Correct.

2 Q And as the executive chairman of the debtors, you're  
3 generally responsible for company strategy, which includes  
4 the resolution and the handling of company litigation, right?

5 A Correct.

6 Q Now Lordstown or LMC -- and if I say "LMC," you'll  
7 understand I'm referring to the debtors, correct?

8 A Sure.

9 Q So LMC was founded as a vertically integrated vehicle  
10 OEM, correct?

11 A Correct.

12 Q And "OEM" means "original equipment manufacturer"?

13 A Correct.

14 Q Essentially, that just means that you're the company  
15 that's making the cars, right?

16 A The automaker, right.

17 Q Right.

18 And "vertical integration" refers to the fact that LMC  
19 intended to develop, manufacture, and sell vehicles all on  
20 its own, correct?

21 A Correct.

22 Q But in 2021, LMC determined that it had to transition  
23 away from a vertically integrated model, right?

24 A Correct.

25 Q And that's because it determined that being vertically

1 integrated was not an economically viable model, right?

2 A Not for the company at the time, no.

3 Q And part of that consideration is that the costs of  
4 operating a huge assembly plant were just too steep for the  
5 company to manage on its own, right?

6 A That was part of it, as well as other capabilities.

7 Q And also during 2021, when LMC was making this  
8 determination to pivot away from the vertically integrated  
9 model, it was issuing going concern warnings as part of its  
10 public filings, correct?

11 A Correct.

12 Q A "going concern warning" is essentially a public  
13 statement about the future viability of the company, right?

14 A It -- technically speaking, it is a qualification to an  
15 audit opinion or a disclosure that casts doubt on the bill --  
16 the ability of the company to operate as a going concern for  
17 at least 12 months.

18 Q And those disclosures made their way into LMC's public  
19 filings in 2021, correct?

20 A That's correct.

21 Q The decision to exit the vertically integrated model  
22 led LMC to decide to sell its Lordstown manufacturing plant,  
23 right?

24 A Correct.

25 Q And as a result, LMC sought a buyer for that plant.

1 A That is correct.

2 Q Ultimately, that buyer was Foxconn, right?

3 A Yes, we chose Foxconn as that partner.

4 Q Right.

5 And you agree it could have been any entity capable of  
6 taking on that manufacturing facility, right?

7 A That's correct.

8 Q So, put differently, LMC was committed to selling the  
9 plan irrespective of whether it was ultimately Foxconn that  
10 purchased it.

11 A That -- that's not correct.

12 So, in deciding whether to sell the plant and to whom,  
13 we were looking at other elements of the transaction, as  
14 well, including the terms of any contract or manufacturing  
15 agreement, joint development agreement, and other -- and  
16 other agreements.

17 Q But the point is, Mr. Ninivaggi, that, irrespective of  
18 whether it was Foxconn that was purchasing the plant, LMC had  
19 decided to exit its vertically integrated model.

20 A Only if we found the right partner.

21 Q In addition to finding a manufacturing partner, LMC was  
22 seeking partners in what we'd call "downstream" -- the  
23 "downstream" (indiscernible) of producing a vehicle, correct?

24 A I'm not sure what you mean by "downstream."

25 Q Yeah. So, put differently, one of the partners that

1 LMC was seeking was an OEM partner, right?

2 A We were seeking OEM partners, commercial partners,  
3 service partners, and then obviously a manufacturing partner  
4 with Foxconn.

5 Q So, as part of the pivot away from the vertically  
6 integrated model, LMC was seeking a whole number of partners,  
7 correct?

8 A Correct.

9 Q And the OEM partner specifically would co-develop  
10 vehicles and help LMC with capital costs, right?

11 A That's correct.

12 Q Ultimately, LMC never found an OEM partner, correct?

13 A That process is still continuing. We've had  
14 discussions with a number of potential OEM partners. None --  
15 none has reached a (indiscernible) obviously, a binding  
16 agreement yet.

17 Q Right.

18 LMC has been looking for an OEM partner since at least  
19 twenty -- early 2022 and hasn't found one, correct?

20 A Correct.

21 Q You also mentioned that LMC was potentially seeking a  
22 customer partner, right?

23 A Or partners, correct.

24 Q And that would have been a partner or partners to  
25 commit to making bulk purchases of the Endurance vehicle,

1 correct?

2 A The Endurance vehicle or the new vehicle program. Most  
3 of the commercial discussions were around the new vehicle  
4 program, not the Endurance.

5 Q But as with the OEM partner, LMC never actually found a  
6 customer partner either, correct?

7 A There was -- there was great interest by commercial  
8 partners in a new program, but obviously we needed to define  
9 the new program before we could get that support.

10 Q LMC never entered into an agreement with a customer  
11 partner, right?

12 A We've sold vehicles to customers. I -- you're talking  
13 about a broad relationship with anchor customers? No.

14 Q So, notwithstanding the sale of the plant to Foxconn --  
15 the APA that governed the sale of the plant was entered into  
16 in November of 2021, correct?

17 A Correct.

18 Q And as part of entering into that agreement, Foxconn  
19 made certain significant down payments (indiscernible)

20 A Correct.

21 Q And notwithstanding those down payments, LMC continued  
22 to issue going concern warnings throughout 2022, as well,  
23 correct?

24 A Correct.

25 Q And that's because LMC had a critical need for capital,

1 additional capital on top of whatever it had received from  
2 Foxconn as part of the plant transaction, right?

3 A So I -- I would characterize it this way: For the  
4 Endurance, we needed capital to lower the cost of the  
5 product, but it was a bit of a catch 22 or a chicken and egg.  
6 We needed capital to reduce the bond cost. But at the  
7 current bond cost, it was difficult to -- to attract capital.

8 With the new vehicle program, it really was a function  
9 of our ability to do the pre-development work and show  
10 customers the program. And that was the purpose of the pre-  
development funds that Foxconn had committed.

12 Q Well, I'm focusing on the Endurance here,  
13 Mr. Ninivaggi.

14 The company had a significant need to raise capital to  
15 invest in hard tooling for the Endurance production in 2022,  
16 correct?

17 A In order to scale the Endurance, we would have to  
18 invest in hard tooling, which is basically production  
19 tooling, as opposed to lower volume, non-hard tooling. So,  
20 yeah, to -- to make it successful and profitable longer term,  
21 we would have had to make additional investments in hard  
22 tooling.

23 Q Those investments in hard tooling ran in the hundreds  
24 of millions of dollars, correct?

25 A Correct.

1 Q And LMC actually deferred -- intentionally deferred  
2 those investments throughout 2022, correct?

3 A Well, we made -- we made substantial investments in  
4 hard tooling, but we did defer some.

5 Q And there's still hundreds of millions of dollars in  
6 hard tooling investments outstanding, correct?

7 A Two -- yeah, we think it would be about two hundred to  
8 250 million.

9 Q And it was never contemplated that any amounts paid by  
10 Foxconn would fund the investments in hard tooling for the  
11 Endurance, correct?

12 A That's not correct.

13 Q What's not correct about that, Mr. Ninivaggi?

14 A Well, Foxconn originally invested 50 million for  
15 general corporate purposes and the additional investments in  
16 common stock were for general corporate purposes, including  
17 things like hard tooling.

18 Q LMC had suspended its investments in hard tooling at  
19 the time those investments were made by Foxconn, correct?

20 A That's not correct.

21 The first investment by Foxconn was in September of  
22 2021, and at that time we were investing in hard tooling.  
23 You -- you can't use soft tools on every component, so some  
24 level of hard tooling was required no matter what.

25 Q But by 2022, when Foxconn made its follow-on

1 investments in the investment agreement, LMC had suspended  
2 its investments in hard tooling, correct?

3 A We had significantly diminished the investments, yes.

4 Q And you would agree that LMC did not view Foxconn as a  
5 silver bullet for its problems, correct?

6 A Not a silver bullet, no.

7 Q We spoke about LMC's efforts to attract an OEM or a  
8 customer partner. Do you recall that?

9 A I do.

10 Q And LMC retained the investment bank Jefferies to  
11 assist in those efforts, correct?

12 A Correct.

13 Q And in addition to assisting with finding an OEM  
14 partner or a customer partner, Jefferies was also assisting  
15 with general capital-raising, correct?

16 A Correct.

17 Q And so it's fair to say that LMC was, in addition to  
18 seeking those partnerships, attempting to raise capital in  
19 more traditional manners throughout 2022, right?

20 A That's correct.

21 Q And those efforts continued into 2023, up until the  
22 time of filing, right?

23 A They continued well into 2023, I would say, yes.

24 Q And apart from any equity-raises, open market equity  
25 raises and the investments by Foxconn, LMC was not able to

1 raise that capital, correct?

2 A As I -- as I mentioned, with the Endurance, it was the  
3 chicken and egg issue.

4 With the new vehicle program, there was significant  
5 interest in the program. But until we defined the program  
6 and could explain to customers what exactly it was, there was  
7 no ability to raise money around it.

8 Q Okay. Slightly similar question, Mr. Ninivaggi.

9 LMC wasn't able to raise that capital, correct?

10 A Again, it was -- we couldn't raise the capital without  
11 explaining to people what the proceeds would be used for.

12 Q And part of the reason that LMC wasn't able to raise  
13 capital during this period was because the capital market  
14 environment deteriorated significantly between 2021 and 2023,  
15 correct?

16 A That's correct.

17 Q And this is particularly true for startups like LMC,  
18 right?

19 A Correct.

20 Q And on top of that, LMC had litigation overhang during  
21 the 2022 period, correct?

22 A Correct.

23 Q In fact, many of the same claims and causes of action  
24 that are pending against it today were identically pending  
25 against it in 2022 and impacting its capital-raise, right?

1 A Almost all the -- I think all the claims have been  
2 around since 2021, yes.

3 Q November 2022, after being unable to raise capital in  
4 the capital markets, LMC and Foxconn entered into the  
5 investment agreement, correct?

6 A We entered into the investment agreement in November  
7 2022, after Foxconn had expressed a desire to restructure the  
8 previous agreement.

9 Q And the investment agreement included staged  
10 investments by Foxconn into LMC in exchange for various  
11 amounts and types of equity. Is that right?

12 A Correct.

13 Q And those investments, however, were never intended to  
14 be in lieu of the capital that LMC needed to raise to make  
15 those significant hard tooling investments, right?

16 A Well, again, the 70 million, roughly, of the investment  
17 was in the form of common stock to be used for general  
18 corporate purposes; 100 million was staged to fund pre-  
19 development activities for the new vehicle program.

20 Q And as --

21 A The general --

22 Q -- we've --

23 A -- corporate purposes could have been anything.

24 Q Yeah. But as we discussed, the amount needed to invest  
25 in hard tooling was at least \$200 million, right?

1 A Correct.

2 Q And that's double what Foxconn was going to invest for  
3 general corporate purposes under the investment agreement.

4 A Oh, correct. We -- we definitely would have needed to  
5 raise more money.

6 Q Agreed. Thank you.

7 Now, again, going back to the hard tooling, you agree  
8 with me that the estimated figure for investing in hard  
9 tooling is between two and \$250 million, right?

10 A Roughly.

11 Q But that figure is higher when you account for the  
12 operating losses that either LMC or another entity would  
13 incur in investing in and in deploying that hard tooling,  
14 correct?

15 A That's correct.

16 Q And those can range -- those additional costs can range  
17 anywhere from two hundred and fifty to 300 million additional  
18 dollars, right?

19 A It could, depending how -- on how long it took to  
20 implement the hard tooling and where the hard tooling was  
21 going to be located, what suppliers we would use. So it's  
22 a -- it's a ballpark number, but roughly correctly.

23 Q So the number that LMC has been going to market with is  
24 \$500 million in additional investment.

25 A That was a rough estimate, yes.

1 (Pause)

2 Q We discussed that Foxconn and LMC entered into the  
3 investment agreement in November of 2022. And at that time,  
4 there were some initial investments made in connection with  
5 the signing by Foxconn, correct?

6 A They funded the first tranche of preferred and common  
7 stock.

8 Q That was about \$52.7 million total. Is that right?

9 A Correct.

10 Q And 30 million of that went into preferred equity,  
11 correct?

12 A Correct.

13 Q And your understanding is that, in general, preferred  
14 equity holders, all else being equal, have a distribution  
15 preference to common equity holders.

16 A As a general principle, yes.

17 Q So they would have to be paid back in full before any  
18 money flows to common equity.

19 A Again, as a general principle, yes.

20 Q And the investment agreement contained a second common  
21 equity investment that would occur in the first half of 2023,  
22 correct?

23 A Correct.

24 Q And that investment was valued at approximately  
25 \$47 million. Is that right?

1 A Yeah. The reason it was staged is we needed to get  
2 CFIUS approval in order for Foxconn to acquire more than ten  
3 percent, so the second tranche of common had to be  
4 conditioned on CFIUS approval.

5 Q Okay. And that second tranche was able to come, at  
6 some point, in the first half of 2023, right?

7 A Within, I think, 10 days after CFIUS approval.

8 Q And around April of 2023, Foxconn and LMC began  
9 discussing an alternative transaction structure that would  
10 potentially replace the investment agreement, right?

11 A I believe it was late March.

12 Q And it continued through April, correct?

13 A Through early April.

14 Q In fact, it continued in May, didn't it?

15 A No, I wouldn't say those discussions continued in May.  
16 In late March, the chief product officer of Foxconn,  
17 Mr. Hsiao, told me that Foxconn wasn't comfortable or wasn't  
18 happy, at least, about following through on the second common  
19 stock closing, because our stock price had declined pretty  
20 significantly from the time we agreed on the purchase price  
21 until late March, and sort of inquired as to whether we would  
22 be open to restructuring the transaction.

23 We basically said, Look, a deal's a deal, but if you  
24 have something specific, a proposal, like, we can take it to  
25 the Board. Then, encouraged him to talk to the lawyers at

1 Paul Hastings and connect them with our lawyers to find out,  
2 specifically, he had in mind.

3 That proposal came in early April, which was a proposal  
4 to buy the company for not more than \$48 million of cash.  
5 There were some other terms that were a bit unclear. At that  
6 point, our lawyers were working together to figure out  
7 exactly what that proposal was.

8 MR. WHALEN: Your Honor, I'd move to strike that  
9 as nonresponsive. I think the question was whether the  
10 discussions continued in May.

11 THE COURT: Did they just -- you can answer, but I  
12 won't strike the --

13 THE WITNESS: I wouldn't say so. The discussions  
14 sort of terminated in April and then there were a series of  
15 disputes between the middle of April and May and then the  
16 discussions kind of resumed at that point, or at least a  
17 discussion resumed at that point.

18 BY MR. WHALEN:

19 Q Okay. It sounds like a technical difference,  
20 Mr. Ninivaggi.

21 Were you having discussions with Foxconn about the  
22 resolution of the investment agreement in May of 2023?

23 A I think the disconnect is those weren't continuing  
24 discussions. Foxconn went silent in mid-April and then  
25 indicated an interest in meeting in late May, but there were

1 very few, if any, discussions between early, mid-April and  
2 late May.

3 Q Mr. Ninivaggi, on May 25th of 2023, actually, you sent  
4 a transaction framework to Foxconn, correct?

5 A So on or around May 20th, or so, Foxconn indicated an  
6 interest in having a meeting with senior people on both  
7 sides. It took about a week to set up the meeting because  
8 Foxconn did not want management of LMC to participate in it,  
9 only outside directors. We ultimately agreed on who would  
10 participate in the meeting. My recollection is we had about  
11 an hour meeting on May 24th. Foxconn's CFO had asked us for  
12 some follow-up information. We sent them that information, I  
13 think, on the 25th.

14 Q Mr. Ninivaggi, you're going to have an opportunity to  
15 explore everything with your counsel, but my question is a  
16 simple one. It's a yes-or-no question.

17 Did you send, on May 25th, the transaction framework to  
18 Foxconn, you, personally?

19 A Yes, we did.

20 Q Okay. I want to look at that framework, which has been  
21 admitted into evidence as Exhibit 13?

22 MR. WHALEN: Your Honor, is it okay if I share my  
23 screen to display the exhibit?

24 THE COURT: Yes, but apparently I need a password  
25 in order to open the exhibits that you sent to me.

1 MR. TALMO: Your Honor, Matt Talmo, again, for the  
2 record.

3 The password was included in the email, but I'm  
4 happy to resend it.

5 THE COURT: Well, let me find it. I mean, geez.  
6 Hold on.

7 (Pause)

8 MR. TALMO: It should be in red text, Your Honor.

9 THE COURT: Okay. Got it. Thank you.

10 Nope. Wrong password. Okay.

11 MR. WHALEN: I'm sorry, I find, Your Honor, if  
12 there's an accidental space at the end, that could interfere  
13 with the process.

14 THE COURT: Let me try it again, then.

15 (Pause)

16 THE COURT: You better send it again because it's  
17 saying -- but go ahead and share the screen. We can --

18 (Pause)

19 BY MR. WHALEN:

20 Q Mr. Ninivaggi, can you see my screen?

21 A I can.

22 MR. WHALEN: Your Honor, is my screen visible to  
23 you, as well?

24 THE COURT: Yes, I have it. Thank you.

25 BY MR. WHALEN:

1 Q Mr. Ninivaggi, we're looking at your May 25th email to  
2 two individuals at Foxconn, correct?

3 A Correct.

4 Q And this email attaches a framework for a transaction  
5 between LMC and Foxconn, correct?

6 A Among other things, yes.

7 Q I want to look at that attachment. The first bullet  
8 point on the first page of the statute says: LMC is  
9 providing a framework for the acquisition of LMC by Foxconn.

10 You see that, correct?

11 A I do.

12 Q And you'd agree with me that that's an accurate  
13 statement about what LMC is doing, correct?

14 A Yeah, we discussed this framework, but like I mentioned  
15 to you in our deposition, there were a lot of communication  
16 issues between us and them, so we wanted to put on paper  
17 exactly what we thought we had discussed.

18 Q And Mr. Ninivaggi, we'll get through everything and  
19 you'll have time with your counsel, but my question for you  
20 is that you agree that that is an accurate statement about  
21 what LMC is doing, is that they're providing a framework for  
22 the acquisition of LMC by Foxconn, correct?

23 A Yes.

24 Q And in LMC's view, this framework that's set out on  
25 this page -- I will try to get it all onto one page -- this

1 framework set out here was an acceptable framework in LMC's  
2 (indiscernible)?

3 A Framework. We, obviously, we hadn't agreed on numbers,  
4 but the framework was an acceptable -- an acceptable.

5 Q I want to go through some of the details of this  
6 framework.

7 Part of it is that Foxconn would pay its preferred  
8 equity in every transaction, correct?

9 A Correct.

10 THE COURT: Excuse me, Mr. Whalen. Are we going  
11 to try the adversary between the debtor and Foxconn or are we  
12 going to address the motion to convert or dismiss today?

13 MR. WHALEN: Your Honor, we have actually  
14 endeavored as hard as possible to not litigate the adversary  
15 and as you can probably appreciate, that is very hard for us  
16 to avoid doing just by nature. But we do think that this is  
17 very much relevant to one of the prongs of our motion to  
18 dismiss, which is the alleged bad faith of the debtor, which,  
19 again, we would contend is bad faith of the debtor. We'll  
20 move quickly through this, Your Honor.

21 THE COURT: Okay.

22 MR. WHALEN: I think as you'll see in the  
23 testimony, hopefully, we can tie it altogether and if I  
24 can't, certainly, Mr. Murphy will at the end. But we will be  
25 quick.

1                   THE COURT: All right. I'll give you some leeway,  
2 but ...

3                   MR. WHALEN: All right. Thank you, Your Honor.

4 BY MR. WHALEN:

5 Q       So, we just addressed the preferred interest,  
6 Mr. Ninivaggi.

7                   Another part of this framework sent by LMC is that  
8 Foxconn would make a cash payment in lieu of the second  
9 tranche of common stock funding, correct?

10 A      Correct, although the amount was not proposed.

11 Q      Sure. But the second tranche of common are stock  
12 funding was the \$47 million that we were discussing?

13 A      Yeah, but what we meant there was the cash payment in  
14 lieu of that, not that it would necessarily be the same  
15 number.

16 Q      Sure. But that's what it's referring to. It's  
17 referring to --

18 A      Correct.

19 Q      Okay. A further part of this framework sent by LMC is  
20 that the transaction would be executed through a 363 process  
21 with LMC, right?

22 A      Correct.

23 Q      And another point of this framework stated that in  
24 LMC's view, the parties would enter into a transaction where  
25 LMC would commence litigation in the alternative (inaudible)?

1 A It says the prospect of litigation, yes.

2 Q Okay.

3 A Sorry, I'm having a little difficulty reading it.

4 Q And Mr. Ninivaggi, just to confirm, again, this was  
5 sent to LMC to Foxconn on May 25th, 2023, right?

6 A Correct.

7 Q And LMC filed for Chapter 11 protections on June 27th,  
8 2023?

9 A Correct. The second-to-last bullet point also talks  
10 about timing, the need to move quickly.

11 Q Yeah, but I didn't mean to take it down from you,  
12 Mr. Ninivaggi, but I'm exhausting my (indiscernible)?

13 A Yeah, I got it.

14 Q Okay. Great.

15 Now, Foxconn made an offer to LMC to acquire  
16 substantially all of its assets on June 22nd, 2023, correct?

17 A I wouldn't call it an offer, technically, but it was an  
18 expression of interest, yes.

19 Q You attached that -- I'll refer to it as an offer --  
20 you attached that offer to your declaration in this  
21 proceeding, correct?

22 A Correct.

23 Q And that offer included a cash payment of approximately  
24 \$47 million, correct?

25 A Correct.

1 Q It was the same figure that would have been associated  
2 with the second tranche of common funding?

3 A Correct.

4 Q That offer also included the surrender of Foxconn's  
5 \$30 million in preferred equity, correct?

6 A Correct.

7 Q And the offer from Foxconn also called for the  
8 transaction to be executed within bankruptcy, correct?

9 A Correct.

10 Q And that offer also contained a release of claims to  
11 avoid litigation, right?

12 A Correct.

13 Q Okay. And, again, that offer came to LMC less than a  
14 month after you had sent this framework over, correct?

15 A Correct. Four weeks.

16 Q And LMC did not accept Foxconn's offer; is that right?

17 A We didn't accept the offer and proceeded with the  
18 bankruptcy filing.

19 Q You made reference here just before that your framework  
20 was not meant to indicate that \$47 million was an acceptable  
21 cash payment for the common equity funding, correct?

22 A We didn't propose a number, no.

23 Q Okay. You actually even went back to Foxconn with a  
24 counteroffer of what you felt was an appropriate cash  
25 payment, correct?

1 A Our counsel went back to your colleagues at Paul  
2 Hastings and says the number seemed light, but more  
3 importantly, we needed more certainty. We wanted something  
4 that was binding.

5 Q LMC never went back to Foxconn with a number that it  
6 viewed was appropriate to get that deal done, correct?

7 A Again, our counsel went back to Paul Hastings and  
8 stressed the need to have something binding. That was a  
9 bigger issue than a number.

10 Q Okay. But I want to focus on my question about the  
11 number. You never went back to Foxconn with a number, did  
12 you?

13 A Not with a specific number, no.

14 Q And when we spoke last Thursday, you couldn't recall  
15 whether LMC's board of directors actually kept minutes of any  
16 discussion of Foxconn's number, correct?

17 A Yeah, I wasn't sure whether it was a board call or a  
18 formal meeting. I did go back and verify that it was a  
19 formal meeting on June 25th to discuss Foxconn's proposal and  
20 what impact it should have, if any.

21 Q And as of last Thursday, LMC has received no binding  
22 offers to acquire all or substantially all of its assets,  
23 correct?

24 A Yeah, we're still in the sales process and the binding  
25 offers are due on September 8th.

1 Q Yeah, but the stalking horse deadline was last  
2 Thursday, correct?

3 A Correct.

4 Q And LMC did not file a stalking horse bid?

5 A We did not.

6 Q Okay. And as noted, you ultimately filed these  
7 Chapter 11 cases just five days after receiving the offer  
8 from Foxconn, correct?

9 A Correct.

10 Q And as part of filing these cases, you also filed an  
11 adversary proceeding against Foxconn in the very same day,  
12 correct?

13 A We did.

14 Q But you concede you could have brought that litigation  
15 at a later point in time in these bankruptcy cases, correct?

16 A We could have, sure.

17 Q There were no statute of limitations issues or other  
18 procedural issues forcing you to bring that at the exact same  
19 time, correct?

20 A No.

21 Q Yeah, I want to switch gears a little bit,  
22 Mr. Ninivaggi, to the litigation facing the company.

23 You're familiar with the Karma litigation, correct?

24 A I am.

25 Q And I will ask if that was recently resolved. It was

1 resolved this morning.

2 You're aware of that, correct?

3 A I am.

4 Q Okay. And the terms of that settlement in broad  
5 strokes -- I don't want to get too deep into it -- it was  
6 just that it was a cash payment of \$40 million from LMC to  
7 Karma, correct?

8 A Correct.

9 Q In addition to the Karma litigation, LMC is also facing  
10 securities class-action claims, correct?

11 A Correct.

12 Q And it's facing an investigation from the SEC?

13 A Correct.

14 Q And it's also facing derivative claims, correct?

15 A Correct.

16 Q And, in general, all those claims, the securities  
17 claims, the SEC investigation, and the derivative claims  
18 generally revolve around the same set of facts, right?

19 A Yes.

20 Q And certain directors and officers sued in the  
21 securities cases have brought indemnification claims against  
22 the company, right?

23 A Correct.

24 Q But currently, the insurance is covering the costs and  
25 fees for those individuals, right?

1 A That is not correct.

2 So, we've been covering the costs for all of the Ds and  
3 Os. The only thing insurance is covering is the Delaware  
4 class action; they're covering those costs. The company is  
5 technically not a party to it. So our costs we would incur,  
6 the litigation costs, are being covered by the D&O policies  
7 in that action.

8 Q Okay. But there are D&O policies with available  
9 coverage for those cases, correct?

10 A Yeah, it's eroding, but there's still coverage just for  
11 the Delaware class action. The insurers on all the other  
12 cases have denied coverage.

13 Q But there is insurance available if that denial of  
14 coverage were to be reversed, correct?

15 A I'm sorry, could you repeat it?

16 Q There is insurance coverage available, it just happens  
17 to have been preliminarily denied by the carriers, correct?

18 A Well, they've issued formal denials of coverage based  
19 on a prior act exclusion. So, at this point, we have a  
20 coverage dispute, but the insurers, the primary insurers on  
21 the company policy have denied coverage.

22 Q Right. And you're disputing a denial as we stated?

23 A We have not made a determination yet on how and when to  
24 dispute it. In the meantime, we've been incurring all the  
25 costs with the D&O legal expenses.

1 Q Now, prior to the resolution of the Karma case, the  
2 company took an aggregate accounting reserve covering the  
3 potential resolution of all of these litigation claims,  
4 correct?

5 A We had a -- if my recollection is correct, we had a  
6 reserve for contingent liabilities of I think a little over  
7 \$75 million at the end of June.

8 Q Prior to the period ending June 30th, 2023, that figure  
9 was closer to approximately \$36 million, correct?

10 A That's correct.

11 Q And that could just be found in your public filings,  
12 correct?

13 A Correct.

14 Q So when Karma settled, the company revised that reserve  
15 for the period ending June 30, 2023, upwards by about  
16 approximately \$39 million, correct?

17 A That's not correct, actually.

18 So we had a reserve for Karma as of March 31st, a small  
19 reserve, and we increased it as of June 30th to reflect,  
20 basically, the settlement.

21 Q The company reports an aggregate reserve, correct? A  
22 single figure covering all litigation claims?

23 A Correct.

24 Q And so that aggregate reserve increased from  
25 approximately \$36 million to \$75 million as of the period

1 ending June 30th, 2023, correct?

2 A Correct.

3 Q Okay. Again, the company filed for bankruptcy on  
4 June 27th, 2023, correct?

5 A Yeah, the point I'm making is there were some  
6 (indiscernible) and takes. It was not all Karma.

7 Q That's fair, Mr. Ninivaggi, but you agree that that is  
8 the degree to which the reserve moved in the period ending  
9 June 30th?

10 A Correct. Correct.

11 Q And the public disclosure for the period ending  
12 June 30th, 2023, was filed after the resolution of the Karma  
13 action, correct?

14 A Correct.

15 Q The company has been in settlement discussions with the  
16 securities plaintiffs, correct?

17 A Correct.

18 Q And you'd agree that there's a settlement framework in  
19 place with those groups?

20 A No. We have worked for the better part of the last six  
21 or eight months to work out a settlement. We thought we were  
22 within range, but we were never able to finalize it.

23 Q But substantial offers have been made, correct?

24 A Offers have been made, but we haven't been able to  
25 finalize it.

1 Q And to be clear, Mr. Ninivaggi, I don't mean  
2 substantial in terms of amount, but substantial in terms of  
3 the progress that's been made towards a resolution?

4 A Well, it's not resolved until it's resolved. There's  
5 still an outstanding, a fairly significant outstanding issue.

6 Q Now, the company has also been in settlement  
7 discussions with the SEC, correct?

8 A Correct.

9 Q And it received a settlement offer from the SEC; is  
10 that right?

11 A That is correct.

12 Q And that offer came about four to five months ago; is  
13 that right?

14 A You know, it may have been. I went -- I meant to go  
15 back and look. It may have been five or six months ago, but  
16 in that time frame.

17 Q Yeah. So more than four months ago, right?

18 A Correct.

19 Q And the company hasn't responded to that offer yet,  
20 right?

21 A We've had discussions with the SEC, but we have not  
22 formally countered, no.

23 Q And that offer included the possibility of an offset of  
24 any settlement with the SEC by amounts paid to resolve the  
25 security cases?

1 A No, that may have been a confusion in the deposition.

2 The indication from the SEC is that they would  
3 entertain a counter, okay; of course, I have no idea how they  
4 would respond to a counter. And that there might be some  
5 credit for amounts that we contributed to the securities  
6 litigation, but by no means, like a dollar-for-dollar credit.

7 But, frankly, what the SEC does is what the SEC does.  
8 We don't know.

9 Q But they haven't ruled out the ability of crediting  
10 settlement amounts paid to the securities claimants against  
11 any settlements with the SEC?

12 A Maybe some portion is kind of the indication we  
13 received, but again, there was no formal agreement or  
14 proposal on that point.

15 Q And then currently, all the securities and derivative  
16 cases are stayed, correct?

17 A Well, the Delaware class action is not.

18 Q But the other --

19 A The Ohio securities litigation is stayed, pending the  
20 motion to dismiss, so are the derivative claims. But we  
21 have, as I mentioned, incurred a decent amount of costs in  
22 settlement negotiations.

23 Q Apart from the Delaware class action where the company  
24 is not a party, the cases are stayed pending a ruling in the  
25 Ohio securities case, correct?

1 A Correct.

2 Just one thing to clarify on the SEC action. It's also  
3 possible that the SEC will take enforcement action against  
4 individuals. We would also potentially have indemnification  
5 obligations.

6 Q Yeah, but there's been no indication that that's  
7 actually going to happen, has there?

8 THE WITNESS: Jason, I don't know --

9 MR. ZAKIA: Your Honor, at this point, I'm not  
10 quite sure whether or not what the witness is going to refer  
11 to as confidential or not, and so in this public setting, I  
12 prefer that he not go there.

13 MR. WHALEN: And, Your Honor, if I may, briefly?

14 I don't know that we, Foxconn, care so much, but  
15 if Mr. Ninivaggi is going to speak extemporaneously on other  
16 matters, I mean, we want to explore them. I mean, it could  
17 have been avoided if we didn't go back to (indiscernible).

18 THE COURT: Is it really relevant?

19 MR. WHALEN: I don't know that it is. If Your  
20 Honor doesn't think it is, I don't think we think it is.

21 THE COURT: All right. Move on, then.

22 MR. WHALEN: Okay. Will do.

23 BY MR. WHALEN:

24 Q The decision that -- in the Ohio securities case that  
25 the other cases are awaiting is a decision on a motion to

1 dismiss, correct?

2 A Correct.

3 Q And that's been fully briefed and pending since 2022,  
4 right?

5 A Correct.

6 Q One last time, I think, Mr. Ninivaggi, we discussed at  
7 your deposition that prepetition, the debtors had engaged in  
8 a number of cost-cutting measures, correct?

9 A Correct.

10 Q This included limiting protection of the Endurance,  
11 right?

12 A Correct.

13 Q And you ramped down R&D and engineering costs, right?

14 A Correct.

15 Q And, again, prepetition, you reined in legal costs and  
16 expenses?

17 A As much as we could, yes.

18 Q And you reduced headcount?

19 A Correct.

20 Q You agree that those could be -- could have been and  
21 more implemented irrespective of bankruptcy filing?

22 A Many of those actions were -- predated the bankruptcy  
23 filing. Some actions, you know, not so much. So, for  
24 example, indemnification obligations, trade claims, things  
25 like that were impacted by the bankruptcy filing.

1 Q But the ones that we just discussed, which you  
2 identified as the material items in your deposition, those  
3 could have and were implemented, irrespective of the  
4 bankruptcy filing?

5 A I said those were significant items; I didn't say there  
6 weren't others.

7 Q Yeah, but again, focusing on those significant items --

8 A Yeah, I agree.

9 Q Yeah. You agree that they could have been and were  
10 implemented irrespective of the filing?

11 A Correct.

12 Q And the one exception there is legal spend, which you  
13 admit has increased for the company due to the bankruptcy,  
14 right?

15 A There have been increased, yeah, obviously, bankruptcy-  
16 related costs.

17 Q Your testimony was that legal spend has gone up because  
18 of the bankruptcy, right?

19 A Total legal spend? Yeah, it has.

20 MR. WHALEN: Nothing further at this point, Your  
21 Honor. I'll pass the witness.

22 MR. ZAKIA: Thank you.

23 Your Honor, Jason Zakia for the debtors. May I  
24 proceed?

25 THE COURT: You may.

1 MR. ZAKIA: Thanks.

2 CROSS-EXAMINATION

3 BY MR. ZAKIA:

4 Q Okay. Before we get to most of the questions, I don't  
5 know if Judge Walrath had the same thought pop into her head  
6 that I did, but before we start, we'll talk more about this  
7 with Mr. Hightower, but what's BOM cost mean?

8 A Bill of materials cost. It's basically the direct  
9 production costs for a vehicle.

10 Q Okay. Thank you.

11 Now, Mr. Ninivaggi, did the company's business model  
12 change following your joining the company as, originally, CEO  
13 and chairman?

14 A Yes, we went from a vertically integrated model we had  
15 discussed earlier to a model based more on partnerships and  
16 on Foxconn, in particular. So, we went from developing and  
17 sourcing components for manufacturing and selling vehicles on  
18 our own to doing that in close collaboration with Foxconn.

19 Q And why did the company decide to make that change to  
20 its business model?

21 A We were too small a company. I mean, being an auto  
22 company requires a ton of capital and we didn't feel we could  
23 raise the capital necessary to do that as a vertically  
24 integrated company. And Foxconn brought, at least we  
25 thought, a significant capability, supply chain capabilities,

1 component capabilities, manufacturing expertise. So we  
2 thought the combination of our engineering and product  
3 development, together with their supply chain and  
4 manufacturing expertise would be a great combination.

5 Q And during and that following this change to the  
6 business model, did the company face financial challenges?

7 A Yes.

8 Q Can you explain to the Court what those financial  
9 challenges were, please.

10 A So, the whole current management team joined in the  
11 latter half of 2021. By then, the company had a flood of  
12 lawsuits and had been impacted by a short seller report. Our  
13 stock price was down very significantly, so our financial  
14 alternatives were limited.

15 Before I joined, we had a going-concern opinion and we  
16 were trying to dig ourselves out of that hole from the time I  
17 joined the company.

18 Q Now, during the time the company was pivoting its  
19 business model, was it attempting to raise capital?

20 A It was. So the business model itself was less capital-  
21 intensive, so it lessened what we would need to raise. And  
22 our hope was that investors would see the strength and value  
23 of the partnership and it would be easier to raise money from  
24 both, traditional financing sources, as well as strategic  
25 partners who might offer some business synergies.

1 Q And did the company retain an investment banker to  
2 assist in this process?

3 A We did, Jefferies.

4 Q And what was Jefferies' mandate at that point when they  
5 were originally hired?

6 A It was a broad mandate from the beginning. We didn't  
7 know exactly, you know, the path of these partnerships and  
8 exactly how the Foxconn transactions would play out, so I'd  
9 say we gave them a broad mandate to look for financing and  
10 strategic partner alternatives since they've been involved  
11 with the business model.

12 Q Now, Mr. Ninivaggi, did the Jefferies mandate at that  
13 time include selling the company?

14 A No.

15 Q Okay. Could you explain why not.

16 A We weren't interested in selling the company. We were  
17 actually focused on this collaboration with Foxconn and  
18 improving the value of that business model. Frankly, trying  
19 to sell the company at the time without an established and  
20 credible business model wouldn't have been fruitful.

21 Q Now, was the company able to raise any money during  
22 this period?

23 A We raised money through equity issuances and through  
24 Foxconn investments, but we did not raise money from  
25 traditional financing sources, private financing sources.

1 Q And why was that?

2 A Again, I mentioned it with Mr. Whalen, on the  
3 Endurance, we had a chicken-and-egg issue, and on the new  
4 vehicle program with Foxconn, a number of investors thought  
5 it was promising, but they wanted to see the program, the  
6 details before investing in it. So we just needed to do more  
7 work before we could go out and raise money to run that  
8 program.

9 Q Now, Mr. Ninivaggi, I'd like to shift gears a little  
10 bit and talk about the months leading up to the Chapter 11  
11 filing. What, if anything, happened to cause you and the  
12 Board to consider filing for Chapter 11?

13 A I mean, there were several factors. One is the  
14 business model with Foxconn appeared to be broken. We got to  
15 a point by May or June that we really didn't they we could  
16 repair the damage that had been done with the Foxconn  
17 business model, although, we had hoped to the bitter end to  
18 do so.

19 We also had the litigation. And while we worked very,  
20 very hard to try to settle the litigation and the SEC  
21 investigation, we hadn't made enough progress and our cash  
22 balance was continuing to erode. So, while we had a  
23 significant enough cash balance to continue, we had fairly  
24 significant contingent liabilities, legal expenses, core  
25 operating costs. Even after we cut costs, that, you know,

1 would diminish that cash balance.

2 Q Now, sir, could you please explain for us how the  
3 determination that the business model was broken related to  
4 the decision to file for Chapter 11.

5 A Well, we had sort of gone all in with this Foxconn-  
6 dependent strategy and we, to be fair, we had had highs and  
7 lows with Foxconn. I was confident in March, April earlier  
8 this year that we could patch things back up and get to a  
9 consensual resolution, but after Foxconn made their initial  
10 proposal to buy the company and then essentially went silent,  
11 we had a dispute over a NASDAQ compliance issue. Foxconn  
12 threaten to terminate the agreement. They later acknowledged  
13 that they had no ability, no right to terminate the  
14 agreement, but only after we had to go public and disclose  
15 the termination threat to shareholders. So that started, you  
16 know, created a significant concern, almost a downward spiral  
17 with our shareholder base.

18 And then once we cured the NASDAQ compliance issue,  
19 Foxconn raised another issue relating to our reverse stock  
20 split. That also gave them the basis for not closing. So --  
21 and all those disputes were being played out publicly and at  
22 that point, customers started to pull out, employees started  
23 to quit, potential OEM partners wanted out. So it just sort  
24 of destroyed the whole premise of the business strategy in  
25 our view.

1 Q Now, when did the company take the decision to file for  
2 Chapter 11?

3 A Not to the end. We formally approved the filing, I  
4 think, on a June 25th meeting after we had received the  
5 Foxconn term sheet and I think, you know, we filed on  
6 June 27th.

7 Q Now, I'll get to the term sheet in just a second. I  
8 just want to be clear. You explained to the Court the  
9 business model and the inability to implement the business  
10 model.

11 Were there other factors that drove the company's  
12 decision to file for bankruptcy?

13 A Well, I would say the business model meant the only  
14 real way to realize value from the assets was to have an  
15 asset sale. If we couldn't operate the assets on our own and  
16 our business model was not viable, then we wanted to sell  
17 assets and we thought the bankruptcy would facilitate that.

18 Liquidating all the claims, all the various litigation  
19 claims, again, we had tried to do it out of court, but we  
20 just couldn't get there. We couldn't settle any of them. I  
21 do think, but we'll never know for sure, but, for example,  
22 filing, I think, did help facilitate the Karma settlement  
23 and, hopefully, it has the same effect on some of the other  
24 claims.

25 And then, we're trying to balance the costs of

1 bankruptcy, including the additional restructuring -- you  
2 know, the bankruptcy-related costs against the benefits of  
3 bankruptcy, particularly, speed; the ability to resolve  
4 claims and make distributions, maximize value to stakeholders  
5 quickly. And we're trying to avoid the situation dragging  
6 out any longer and continuing to burn cash.

7       The new vehicle program, again, with Foxconn that we  
8 would raise money around, basically, was not progress at all.  
9 We had delivered the initial set of engineering pre-  
10 development work to Foxconn in March and there was no  
11 feedback, no meetings, no follow-up for three months after  
12 that.

13 Q       Now, I think you mentioned a moment ago when you were  
14 asked during your direct examination about a proposal that  
15 Foxconn made to purchase the company on the eve of  
16 bankruptcy.

17       Do you recall that testimony?

18 A       I do.

19 Q       Did the Board consider that proposal before making the  
20 decision to file for bankruptcy?

21 A       It did.

22 Q       And when was the conclusion?

23 A       The conclusion was, essentially, that we didn't have  
24 much confidence they would actually follow through on it. We  
25 had issues with the terms, to some extent, but it was really:

1     Would they follow through?

2           I had had conversations with Mr. Hsiao before Foxconn  
3 delivered the proposal. We were trying to settle it to the  
4 bitter end. And I said, Just, it has to have some teeth in  
5 it. There has to be some binding element because this has  
6 just dragged on way too long.

7           At that point, we had been in sort of discussions  
8 regarding a consensual resolution for nearly three months and  
9 the proposal came in and it was viewed as highly conditional.  
10 It also, as you mentioned, envisioned Chapter 11 in any  
11 event, so we thought if Foxconn were interested in  
12 participating in a sale process, it could do so without  
13 necessarily needing to be the stalking horse bidder on day  
14 one.

15 Q       And when you say, "highly conditional," what are you  
16 referring to?

17 A       Well, it has a broad due diligence condition, which was  
18 a red flag for us, because nobody knew the company better  
19 than Foxconn, not only the Endurance side, but all the  
20 materials, all the work we had done on the new vehicle  
21 program. So the fact that they felt they could do 30 days of  
22 diligence on a business plan that they were part of just  
23 struck us as potentially a delay tactic or they're not  
24 serious.

25 Q       Now, you testified a moment ago that one of the things

1 that you've been able to accomplish in the Chapter 11 was the  
2 Karma settlement. Following the Karma settlement, is there  
3 more work that needs to be done?

4 A Sure. I mean, the securities litigation is very  
5 significant. We'd like to settle that and, obviously, the  
6 SEC claim. It's all related.

7 Our view is that it might be easier to settle the SEC  
8 claim after we settle the securities litigation. But it's  
9 really important that we get that done.

10 Q And what's the current status of the sale process?

11 A It's ongoing, as I think I mentioned. The bid deadline  
12 is September 8th and it's continuing.

13 Q And could you describe for the Court what you believe  
14 the consequences for the company would be if these Chapter 11  
15 cases were to be dismissed today?

16 A Yes. I think the sales process would fall apart. The  
17 litigation would continue to be difficult to settle. We'd  
18 continue to burn cash. Ultimately, we would, you know,  
19 operate until we -- our cash balance eroded even further. So  
20 I don't think it would be a good outcome.

21 MR. WHALEN: Your Honor, I'd like to object; move  
22 to strike. It's speculation with respect to what happened  
23 with the sale process. He's not the one attempting to sell  
24 these assets.

25 THE COURT: I'll overrule. I think he's qualified

1 to answer that.

2 MR. ZAKIA: On that note, Your Honor, I have no  
3 further questions at this time.

4 THE COURT: Any recross or redirect?

5 MR. WHALEN: It's one of those two, but yes, Your  
6 Honor.

7 MR. ZAKIA: Hostile redirect.

8 THE COURT: Thank you.

9 (Laughter)

10 MR. WHALEN: It wouldn't be hostile with  
11 Mr. Ninivaggi.

12 (Laughter)

13 REDIRECT EXAMINATION

14 BY MR. WHALEN:

15 Q Mr. Ninivaggi, the company entered bankruptcy with  
16 \$136 million in cash, correct?

17 A Correct.

18 Q And, also, you weren't able to identify a single signed  
19 agreement that was broken in the spring of 2023 by virtue of  
20 what you allege was Foxconn's misconduct, correct?

21 MR. ZAKIA: Your Honor, now I object. I feel like  
22 that directly goes to the adversary that we're going to try  
23 at a later time.

24 THE COURT: Well, and it also calls for a legal  
25 conclusion, I think, so I'll sustain the objection.

1 MR. WHALEN: All right. We'll move on, Your  
2 Honor. I'm just trying to address what came up before.

3 BY MR. WHALEN:

4 Q You -- Mr. Ninivaggi, you agree with me that, well,  
5 take a step back.

6 The Karma case was set to go to trial in the spring of  
7 2023, before being delayed to September, correct?

8 A Correct.

9 Q And you agree with me that the company would not have  
10 filed for bankruptcy in the spring just to avoid going to  
11 trial with Karma, right?

12 A That's correct.

13 Q Okay. I want to revisit the Foxconn proposal and just  
14 touch on it.

15 Briefly, we discussed the economics of it: 30 million  
16 in preferred and then the \$47 million cash payment, correct?

17 A Correct.

18 Q And you would agree with me that absent any other  
19 constraints on capital from unsecured creditors or secured  
20 creditors, that would represent a total of \$77 million in new  
21 money for distribution to common equity, correct?

22 A Correct. Correct.

23 MR. WHALEN: Nothing further, Your Honor.

24 THE COURT: All right. Thank you.

25 Anything further, Mr. Zakia?

1 MR. ZAKIA: No, Your Honor.

2 THE COURT: All right. Thank you, Mr. Ninivaggi.  
3 You're excused.

4 THE WITNESS: Thank you, Judge Walrath.

5 (Witness excused)

6 MR. WHALEN: Your Honor, I will defer to your  
7 preference for cadence and whether the Court needs a break,  
8 but otherwise, we can proceed with Mr. Hightower, who should  
9 be the second and final witness.

10 THE COURT: How long do you think you'll be with  
11 Mr. Hightower?

12 MR. WHALEN: Hard to predict, but I will be bold  
13 and attempt to plead for Mr. Zakia and say I think we'll both  
14 be shorter with Mr. Hightower, but I'm not sure.

15 THE COURT: All right. Well, let's proceed with  
16 him and then maybe -- unless anybody else wants a break now?

17 (No verbal response)

18 THE COURT: Let's proceed with Mr. Hightower and  
19 I'll ask the clerk to swear him in.

20 THE CLERK: Please raise your right hand.

21 EDWARD T. HIGHTOWER, MOVANT'S WITNESS, AFFIRMED

22 THE WITNESS: I do.

23 THE CLERK: Please state your full name and spell  
24 your last name for the record.

25 THE WITNESS: Edward, middle initial T.,

1 Hightower, H-i-g-h-t-o-w-e-r.

2 THE COURT: All right. You may proceed,

3 Mr. Whalen.

4 MR. WHALEN: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. WHALEN:

7 Q Good morning, just barely, Mr. Hightower.

8 A Good morning, Mr. Whalen.

9 Q Mr. Hightower, you are the president and CEO of the  
10 debtors, correct?

11 A Yes, I am.

12 Q And you joined the company as president in November  
13 of 2021; is that right?

14 A That's correct.

15 Q You then ascended to the CEO position in July of 2022,  
16 right?

17 A Correct.

18 Q And you also sit on the company's Board of Directors?

19 A I do.

20 Q And your job as CEO is to lead the day-to-day business  
21 operations of the company, right?

22 A Yes.

23 Q Were you in court for Mr. Ninivaggi's testimony,  
24 Mr. Hightower?

25 A Yes.

1 Q Okay. I'll briefly recover some of the ground that we  
2 covered with Mr. Ninivaggi, but I'll keep it shorter.

3 Lordstown was founded as a vertically integrated OEM, right?

4 A (Inaudible.)

5 THE COURT: Could you keep your voice up,  
6 Mr. Hightower.

7 THE WITNESS: Oh, I apologize.

8 Yes, it was.

9 BY MR. WHALEN:

10 Q Thank you. And in or around late 2021 and into 2022,  
11 it pivoted to what you would describe as an asset-light  
12 business model, correct?

13 A That's correct.

14 Q And the decision to undergo that pivot occurred prior  
15 to you joining the company, right?

16 A Just prior, yes.

17 Q And one of the consequences of this pivot to an asset-  
18 light model was that LMC was able to reduce its fixed costs,  
19 correct?

20 A Yes, the sale of the plant would reduce our fixed  
21 costs.

22 Q And that was -- the purpose of that, among other  
23 initiatives, was to help scale the production of the  
24 Endurance, right?

25 A It was a small portion of that, but it was in that

1 direction. A small OEM like us, owning a production facility  
2 that could build approximately 300,000 per year was not  
3 necessarily the best industrial logic, so we sought that  
4 partnership with Foxconn and, yes, it would be -- it would  
5 help us reduce the fixed costs, but other actions would be  
6 needed to fully achieve scale (indiscernible).

7 Q Right. So, again, it was one of a bunch of other  
8 factors that impacted LMC's ability to scale production of  
9 the Endurance, right?

10 A It was one step towards that, correct.

11 Q And another key component of scaling the Endurance was  
12 reducing the cost of production of the Endurance, correct?

13 A That's correct.

14 Q And Mr. Zakia mentioned BOM, or bill of materials, and  
15 you understand that that means the cost of the materials that  
16 goes into the vehicle?

17 A Yes. Yeah, bill of materials is another way to  
18 describe the list of parts that go into a vehicle, yes.

19 Q So when you look at all of the components that go into  
20 the COGS, or the cost of goods sold, for the vehicle, that  
21 include some other items beyond the bill of materials, right?

22 A Yes, there's labor costs. There's the (indiscernible)  
23 costs, Your Honor, as an example, in addition to the cost of  
24 the parts themselves.

25 Q At the time that LMC sold the plant to Foxconn, the

1 cost to produce a single Endurance was in excess of \$200,000,  
2 correct?

3 A Yes.

4 Q In fact, that cost of production has not materially  
5 deviated to this day, right?

6 A It has come down a bit, but it is still materially  
7 higher than our selling price, as is typical for a brand new  
8 platform with lots of new technology and a new electric  
9 vehicle comes down to market.

10 Q But the BOM alone, the bill of materials, alone, is  
11 \$186,000, right?

12 A Today, that's our -- that is our -- that is our current  
13 cost to date, yes.

14 Q And that doesn't include other items that are also put  
15 into COGS, such as tariff costs, freight costs, et cetera,  
16 right?

17 A Right.

18 Q Now, the LMC sold the manufacturing plant to Foxconn  
19 for an all-in consideration of approximately \$260 million; is  
20 that right?

21 A That's approximately correct, yes.

22 Q And LMC retained two of its production lines that were  
23 in that plant; those didn't convey to Foxconn, right?

24 A The two lines I believe you're referring to,  
25 Mr. Whalen, are the battery module pack line and the hub

1 motor line, which Lordstown installed into the plant. We  
2 started installing them before selling the plant to Foxconn  
3 and completed the installation of the battery pack line and  
4 the hub motor line before and during the launch of the  
5 production (indiscernible) of the Endurance pickup. And,  
6 yes, we did retain ownership -- we do retain ownership of  
7 that.

8 Q Mr. Hightower, I'm having a little difficulty with your  
9 audio. I don't know if others are, as well.

10 If it's fine for everyone else, I can continue. I just  
11 wanted to --

12 THE COURT: Just keep your voice up.

13 THE WITNESS: Okay. I will.

14 BY MR. WHALEN:

15 Q And those two lines that you just referenced,  
16 Mr. Hightower, are part of the assets that Lordstown is  
17 attempting to sell in this proceeding?

18 A Yeah, that's correct.

19 Q And Lordstown's gain on selling the plant asset to  
20 Foxconn is in excess of \$200 million, correct?

21 A Well, I didn't see it as a gain because it was  
22 additional cash that went into completing the development,  
23 the execution, the testing, and the launch of the Endurance,  
24 which would benefit Lordstown and the Foxconn  
25 (indiscernible).

1 Q I think we went over that nuance at your deposition,  
2 Mr. Hightower, and you agreed with me that the recognized  
3 gain on the asset was in excess of \$200 million; is that  
4 correct?

5 A Yes, I think where we disconnected, though, was on the  
6 term "gain." It was not like a cash capital gain, if you  
7 will. It went directly into completing the product that is  
8 now on the market.

9 Q Mr. Hightower, a key component of scaling the Endurance  
10 is the acquisition of hard tooling, correct?

11 A Yes, that is one of the key components.

12 Q And you heard us discuss some of that with  
13 Mr. Ninivaggi, right?

14 A Yes, I did.

15 Q And the company actually began deferring hard tooling  
16 investments all the way back in 2021, correct?

17 A We have \$130 million in hard tools for the Endurance  
18 and I believe some of that would still have been purchased  
19 in 2021 and into 2022. As I recall, we didn't really start  
20 curtailing the purchase of hard tools until later into the  
21 year of 2022 as we got closer to the production launch.

22 Q Mr. Hightower, you told me on Friday when we were  
23 together that Lordstown began deferring some of its hard  
24 tooling purchases as early as 2021.

25 Do you have any reason to disagree with what you told

1 me on Friday?

2 A So, what I -- I don't believe we looked at a complete  
3 schedule of why we bought -- when we bought each portion of  
4 hard tooling. So if that was deferred early in 2021, it's  
5 certainly possible, because as we talked about on Friday,  
6 about two-thirds of our tooling is hard tools and about --  
7 excuse me -- about two-thirds of our tooling is soft tools  
8 and about a third part of our tooling is hard tools.

9 So, as most of the truck is built off of hard tools,  
10 yes, those decisions would have had to have been made  
11 in 2021. But in terms of reducing the amount that we were  
12 spending on hard tools, I don't believe we backed off on that  
13 until later in the year. But what we would have to do is  
14 look at a schedule for each tool, because, you know, there  
15 are about twelve or 1300 parts in the bill of materials in  
16 the Endurance and then some of those are subsystems and  
17 subparts, so it expands much further.

18 And each of those tools have a different build  
19 schedule. Not attempting to, you know, get too  
20 (indiscernible), but since we built so much of the vehicle on  
21 soft tools, you're absolutely correct, some of those  
22 decisions would have had to have been made in 2021. But our  
23 deciding to -- our decision to conserve cash by not spending  
24 more on hard tools, I believe that went further into 2022.

25 Q Yeah, and, in fact, in 2022, you made a public

1 statement to the market that LMC would no longer invest in  
2 hard tools, subject to it finding an OEM partner to help make  
3 that capital investment, correct?

4 A Yes, I believe how we explained it, Mr. Whalen, is that  
5 we were going to build a limited quantity of the Endurance  
6 and thought it was important to complete the vehicle, launch  
7 it, and get it into production and into market. But it went  
8 public that our BOM cost was materially higher than our  
9 selling price, so we felt that we needed to bring on an OEM  
10 partner, another OEM that could (indiscernible) a version of  
11 the Endurance for and then their volume for that version of  
12 the Endurance plus our volume would spread that hard tooling,  
13 that two hundred to \$250 million hard tooling investment  
14 across a number, a larger number and make more business  
15 rationale to do that. So, that's what we did in mid-2022  
16 (indiscernible).

17 Q All right. So, to clarify, in the middle of 2022, you  
18 announced to the market that if you couldn't find an OEM  
19 partner, you weren't going to invest anymore in hard tooling,  
20 correct?

21 A I don't believe we raised it as we weren't going to  
22 invest anymore in hard tooling; what we said was we needed to  
23 invest in additional hard tooling and we needed to raise the  
24 two hundred to \$250 million in order to do that. I don't  
25 think we made the hard commitment that we will not spend any

1 more on hard tooling. What we said was, in order to bring  
2 the BOM costs and in order to scale the Endurance, we would  
3 need to make that investment and that investment would make  
4 the most sense with the volume of another OEM, plus Lordstown  
5 (indiscernible).

6 Q Well, but just to move on from this, Mr. Hightower,  
7 let's just simplify it. You weren't going to scale the  
8 Endurance unless you found an OEM partner, right?

9 A That's correct. That's correct. We thought it  
10 important to bring the vehicle to market, but given the cost  
11 being higher than the selling price, we thought it would make  
12 more sense to bring the cost down before scaling it and we  
13 were actually going to pivot the new vehicle program that we  
14 were developing in collaboration with Foxconn, and that would  
15 be the core of our business, rather than the Endurance.

16 Q You actually made this decision. So the decision was  
17 announced publicly in the middle of 2022, but you told me on  
18 Friday that the company made this decision in early 2022,  
19 correct?

20 A Could you repeat the question, please?

21 Q You announced publicly, we've established, that the  
22 company was not going to scale without an OEM partner, but  
23 that decision was made internally in early 2022, correct?

24 A I believe that's correct, yes.

25 Q Now, we just explored this with Mr. Ninivaggi, but just

1 to establish it here, the company was never able to raise the  
2 capital necessary to make the significant hard tooling  
3 investments it needed to make to scale the production, right?

4 A Well, we saw that capital raise as linked to the  
5 pursuit of an OEM partner. We saw that if an OEM partner  
6 wanted us to do a version of the Endurance for them, that  
7 would be one of the sources for the capital and  
8 justifications of the capital spend on hard tooling and those  
9 discussions are still ongoing. The fact that the vehicle is  
10 now in marketplace and customers have it, we think is a  
11 positive sign for it, but we continued with those actions up  
12 until the filing. But we did not have any -- we had several  
13 discussions -- excuse me -- as Mr. Ninivaggi said, but we did  
14 not reach an agreement with any OEM to date.

15 Q And now you're aware of the investment agreement  
16 between Foxconn and LMC, correct?

17 A Yes, I am.

18 Q And that was signed in November of 2022. We won't  
19 revisit old economics, but you agree, generally, with how it  
20 was described in Mr. Ninivaggi's testimony; is that fair?

21 A Yes.

22 Q And you are aware that in the first half of 2023,  
23 Foxconn made an offer to LMC to acquire all or substantially  
24 all of its assets, correct?

25 A I'm aware that the -- there was an offer made shortly

1 before our filing, but it was not binding and it had several  
2 conditions and as a Board, we did not see it as actionable.

3 Q You're aware of that offer, correct?

4 A Yes.

5 Q And you've just (indiscernible), and as you told me  
6 last Friday, it came on the eve of debtors' bankruptcy  
7 filing, correct?

8 A Yes.

9 Q And as part of LMC's bankruptcy filing, you filed a  
10 lawsuit the exact same day against Foxconn, right?

11 A Yes.

12 Q And, Mr. Hightower, if you don't mind speaking up, I --

13 A Yes. Yes.

14 Q -- want the --

15 A Yes.

16 Q And you approved LMC's bankruptcy filing before you  
17 ever received Foxconn's offer, correct?

18 A As I mention in our -- the deposition on Friday,  
19 Mr. Whalen, we had several meetings leading up to the filing  
20 and the eve of the filing with the Board and we -- you know,  
21 the filing I believe occurred on a Monday and we had several  
22 meetings the days leading up to it and, at one point -- at  
23 some point, the Foxconn -- late Foxconn offer came in. It  
24 was after we had decided that we should make preparations to  
25 file and -- but we did review the offer once it came in.

1       So, yes, we were preparing to file before it came in,  
2 but once we reviewed that offer, we decided not to change  
3 course because, as I mentioned in your last question, in  
4 response to your last question, we did not see that as an  
5 actual or serious offer from Foxconn.

6 Q       But, more importantly, Mr. Hightower, it's fair to say  
7 that the decision to file for bankruptcy and  
8 contemporaneously to Foxconn was made before the company  
9 received the June 22<sup>nd</sup>, 2022 offer from Foxconn?

10           MR. ZAKIA: Objection, Your Honor. Asked and  
11 answered.

12           THE COURT: Overruled. You can answer.

13           THE WITNESS: I would say discussions and  
14 preparations, yes, they did occur before receiving the offer.  
15 But the decision to proceed to filing and actually execute  
16 the file, as I recall, and as I said, there were several  
17 meetings leading up to the filing, as I recall, that decision  
18 was taken after we received the final offer.

19           The conditional ones were pending receiving  
20 something from Foxconn that would suggest we should change  
21 direction.

22           The -- what you referred to as an offer, when that  
23 came in, we had another discussion and approved going forward  
24 with the discussion -- with bankruptcy and lawsuit filing,  
25 which we were already preparing for, after that.

1 BY MR. WHALEN:

2 Q Mr. Hightower, I'm not sure that I heard a yes or no to  
3 the question of -- that I asked.

4 So, is it fair to say the decision to file for  
5 bankruptcy and contemporaneously sue Foxconn was made before  
6 the company received the June 22<sup>nd</sup>, 2022 offer from Foxconn?  
7 Yes or no?

8 A I would say yes, it was made before that, subject to  
9 any change in position from Foxconn which would make us re-  
10 visit that and perhaps hold off on making that filing.

11 MR. WHALEN: Nothing further, Your Honor.

12 THE COURT: All right. Mr. Zakia?

13 CROSS-EXAMINATION

14 BY MR. ZAKIA:

15 Q So, Mr. Hightower, what's the Endurance?

16 A The Endurance is a full-size battery electric pickup  
17 truck. It's one of the first all-electric pickup trucks on  
18 the market. It's the first vehicle that was developed --  
19 developed, engineered, tested, fully-certified and  
20 homologated by Lordstown Motors and launched Lordstown  
21 Motors. It's something the team is very proud of and we were  
22 actually a nominee, semi-finalist, and finalist for North  
23 American Truck-of-the-Year for 2023, earlier this year.

24 Q What does homologated mean?

25 A I apologize. I should've defined that. Homologation

1 is part of the process where you receive all of the  
2 certifications that the vehicle meets all of the local  
3 requirements to be sold in a market.

4 So there are requirements around lighting, requirements  
5 around safety, requirements around emissions, if you're in an  
6 internal combustion engine vehicle, all of those are part of  
7 the homologation process and we're proud that, you know,  
8 we're one of the few OEMs, of the new EPOEMs to actually have  
9 completed that and launch the vehicle.

10 Q And could you describe for the Court the work that the  
11 company put into the Endurance project?

12 A Yes. Our team was responsible for all of the design,  
13 development, engineering, testing, the supplier selection and  
14 sourcing, certification and homologation, the production  
15 launch of the vehicle in the plant, and the sales, marking,  
16 and service of those vehicles.

17 So we're the OEM -- we're the original equipment  
18 manufacturer for the Endurance.

19 Q Now, we had some talk about this in your direct  
20 testimony. Did the company ever get to the point where the  
21 costs, the BOM costs of the Endurance were lower than the  
22 selling price?

23 A No.

24 Q And why not?

25 A For a couple of reasons. As the new leadership team,

1 Mr. Ninivaggi, myself, and the others who joined the company  
2 in the latter part of 2021, the BOM costs was materially  
3 higher than the selling price. We believe that it was  
4 primarily due to a desire to get to market quickly with the  
5 Endurance, which drove some -- a higher cost supply chain or  
6 supplier selection, if you will, some higher costs designs,  
7 and a greater focus on soft tools, which are more -- you  
8 know, less expensive in an investment standpoint, but you  
9 often pay a penalty in cost -- material costs.

10 All of those factors contributed to the BOM cost being  
11 higher than the selling price.

12 Q Now, did the company attempt to raise money in order to  
13 scale the Endurance?

14 A Yes we did. As part of our OEM partner pursuit and  
15 capital raising pursuit, that was one of our attempts to  
16 raise that money for the hard-tooling and cost-reduction  
17 actions which would make scaling the Endurance make more  
18 sense, given that the BOM cost was materially higher than the  
19 selling price.

20 Q And what's the -- what is the relationship, if any,  
21 between scaling and BOM costs?

22 A Well, it doesn't make this logic to scale a product  
23 when you're -- when it costs significantly more than it does  
24 to sell it. You know, when it costs more to build than to  
25 sell, it doesn't necessarily make sense to scale that until

1 you have a path to bring that cost down and that's why we  
2 were going to -- you know, but we still saw the benefit in  
3 completing the product and launching the product. We thought  
4 it was a strong concept product, a good demonstration of the  
5 capability at Lordstown Motors, our engineering team, our  
6 product development team. We thought it was a good  
7 demonstration of our work with Foxconn, actually, and that  
8 getting the product in the hands of consumers would be a good  
9 indication of what our team can do and we're -- you know,  
10 we're pleased with the response that we received from  
11 customers on the product.

12 Q Now, what was the outcome of the company's efforts to  
13 find financing to scale the Endurance?

14 A Well, we had several discussions with potential OEMs  
15 where a version of the Endurance could've made sense in their  
16 product portfolios, especially since it was one of the few  
17 full-size pickup trucks and, you know, electric pickups are  
18 the most profitable segment in the U.S. and it's the second  
19 most popular market segment from a sales line standpoint.  
20 But we did not have any firm offers to date. There was  
21 interest, but no firm offers to date.

22 Q And does that mean that the Endurance project has been  
23 a -- platform has been a failure?

24 A No. No. It does not. The feedback from customers has  
25 been positive. Even the feedback from those who were

1 considering it for a partnership was -- did not point to the  
2 significant issues or concerns in the product. It was -- no,  
3 it does not at all mean that it is a failure.

4 Matter of fact, I think it's been a good demonstration  
5 of how electric vehicles can reduce ownership costs with  
6 the -- in the commercial fleet space and it is a good  
7 demonstration of what our elite team was able to do.

8 Q Now, was the Endurance the only product that the  
9 company was developing?

10 A No. With the relationship with Foxconn, we were  
11 actually planning on doing the early development work on a  
12 new platform and multiple additional vehicles for a  
13 commercial fleet market.

14 Our plan and a reason for developing the new platform  
15 was so that we could develop it more efficiently at the  
16 beginning so we wouldn't have the BOM cost issue that the new  
17 leadership team, Mr. Ninivaggi and myself, found when we  
18 joined the company, when we saw that as an opportunity to  
19 build a more scalable vehicle platform on which we could  
20 create multiple models and achieve that scale by greater  
21 level of parts sharing and greater level of collaboration  
22 with Foxconn or -- and collaboration with Foxconn's EV  
23 ecosystem so that we could benefit from these EV components  
24 that Foxconn was looking to enter, those businesses they  
25 were looking to enter.

1       We could be the OEM that would incorporate those  
2 components into our new vehicle platform and use that scale  
3 and share them across multiple models so we could share those  
4 cost advantages with our customers.

5 Q       And what is the current status of the new vehicle  
6 program?

7 A       We completed a fair amount of pre-development work, and  
8 that's basically the planning, the engineering, the  
9 architectural development, the development of staffing  
10 requirements, initial BOM -- SBOM configurations, initial  
11 discussions with suppliers. We completed a fair amount of  
12 that work between the fall and spring, fall of 2022 and  
13 spring of 2023, but we put that on pause when it became clear  
14 that Foxconn was not going to honor their commitment to be in  
15 agreement around the new product program.

16           MR. WHALEN: Your Honor, I'm going to object now  
17 as this is now beyond the scope of relevance and getting into  
18 the AP issues. The new vehicle program isn't an asset for  
19 sale and the bankruptcy First Day declarant said that they  
20 are going to liquidate if they sell or do not sell and  
21 they're only trying to sell the Endurance asset. So I think  
22 we're interested in the AP now.

23           THE COURT: Yeah, Mr. Zakia, are we going far  
24 afield?

25           MR. ZAKIA: Okay. I'll -- thank you, Your Honor,

1 for the guidance.

2 BY MR. ZAKIA:

3 Q Could you tell the Court how many employees does the  
4 company still employee?

5 A Today we employ approximately 126 employees.

6 Q And what is the status of the company's operations?

7 A We -- we've had a fair number of -- we got a fair  
8 number of layoffs since the dispute with Foxconn began in the  
9 spring. However, with these layoffs, we've worked to  
10 maintain critical key level -- key areas on the old  
11 engineering vehicle subsystems and engineering in each major  
12 subsystem of the vehicle.

13 We still have a small team in purchasing, a small team  
14 in advance manufacturing, finance, and sales and marketing.  
15 We basically maintained our core operations to be able to  
16 support the vehicles that are in customers' hands. If any  
17 issues arise, we have the technical capability to address  
18 them and then also support the sale of the Endurance program  
19 will be as a going concern of assets.

20 Q When you say sell the company as a going concern, what  
21 do you mean by that?

22 A If I -- I meant to say sell the Endurance program  
23 instead of going -- as a going concern, instead of assets. I  
24 meant our preferred buyer would be a buyer who wants the  
25 entire program and needs the value of having the completed

1 vehicle program that is in production and in the hands of  
2 customers; that it -- and that's what our preference would  
3 be. That's what I meant by that, sir.

4 Q Now, what does the company have that a buyer might be  
5 interested in buying?

6 MR. WHALEN: Objection, Your Honor. Calls for  
7 speculation as to the interest of buyers.

8 MR. ZAKIA: Let me rephrase.

9 BY MR. ZAKIA:

10 Q What does the company have that it's currently trying  
11 to sell?

12 A We have the completed Endurance program and the IP  
13 associated with it. The fact that it is a completed vehicle  
14 program and variants of that platform could be created, we  
15 also have the hard-tooling assets that we spoke about, and we  
16 also have the battery line and the HUB motor line in Ohio and  
17 we also really have access to the team that was able to  
18 successfully bring the product into production and all of the  
19 institutional knowledge and best practices and learnings from  
20 that.

21 Q Now, sir, you are also, I believe you testified, a  
22 member of the company's Board of Directors?

23 A Yes. Yes I am.

24 Q And you approved the bankruptcy filing in these cases?

25 A Yes I did.

1 Q And could you explain to Judge Walrath why?

2 A Your Honor, why I approved the process is with Foxconn  
3 not fulfilling their commitment to the investor agreement, it  
4 really made our pivot and our pivot to an asset-like business  
5 model not sustainable because we -- you know, our plan was  
6 the new product program to be the core focus of the business  
7 and without that investment, that was not sustainable.

8 We needed -- realized we needed to sell our most  
9 valuable assets in the most expeditious way and the Chapter  
10 11 filing would allow us to do that, especially given that we  
11 had the ongoing legal issues, the contingent liabilities, the  
12 SEC matters and the derivative claims and the Carmen matter.  
13 We saw the Chapter 11 process as a way to pull those together  
14 and expeditiously conduct a sale that would be most valuable  
15 to our shareholders.

16 Q Now, there was quite a bit of back and forth on this  
17 during your direct examination, but I just want to make sure  
18 we're all crystal clear. At the time you, as a member of the  
19 Board of Directors, authorized the company to file these  
20 Chapter 11 petitions, were you aware of the communication  
21 from Foxconn concerning the -- you know, what it said about a  
22 potential transaction to purchase the company?

23 A Yes.

24 Q Okay. And did that communication from Foxconn cause  
25 you to -- how did it impact your view as to whether the

1 Chapter 11 filing was in the best interest of these debtors?

2 A I viewed that the Chapter 11 filing was still in the  
3 best interest of the debtor.

4 Q Why? Why did that letter cause you to change your  
5 mind?

6 A Oh, no, it did not change my mind. I thought it was in  
7 the best interest before and I thought it continued to be in  
8 the best interest of the company, or the debtors, because we  
9 didn't see the offer as a -- as practical and, quite frankly,  
10 you know, we kept going back and forth and it just  
11 -- over the months with Foxconn and it appeared to be just  
12 the latest delay tactic and, given the conditions and given  
13 the fact that it wasn't binding, we saw it as just an attempt  
14 to, you know, further delay the process and they weren't  
15 committed and we didn't believe they'd go forward with it.

16 MR. ZAKIA: Thank you. No further questions, Your  
17 Honor.

18 THE COURT: Anything further by you, Mr. Whalen?

19 MR. WHALEN: I think very, very brief, Your Honor.

20 THE COURT: Okay.

21 REDIRECT EXAMINATION

22 BY MR. WHALEN:

23 Q Mr. Hightower, you mentioned that one of the key assets  
24 the company is trying to sell is the Endurance program, is  
25 that right?

1 A Yes.

2 Q And you said -- is the word -- a term, fully complete  
3 program?

4 A Fully homologated, fully certified, and it's been  
5 launched into production.

6 Q And the company is --

7 A And sold to customers and we have a roadmap that would  
8 allow us to reduce costs and improve the industrialization  
9 which would make it appropriate to scale.

10 So those would be the next steps that we would  
11 recommend and support the new buyer in taking on. But that  
12 was what I was attempting to convey.

13 Q In the marketing process, the company has been  
14 conveying that it will take approximately an extra \$500  
15 million in investment in that Endurance program to achieve an  
16 ROI, correct?

17 A I believe our management presentation says somewhere  
18 between 300 and 500 million, depending on the buyer and what  
19 we also convey that -- and that could be done in the  
20 approximately 18 months but, you know, having worked on a  
21 number of and led a number of vehicle programs in the auto  
22 industry, that is considerably less time and considerably  
23 less money if a -- versus an OEM doing it alone.

24 Q And the company projects to a potential buyer that if  
25 they do make that 3 to \$500 million investment, it'll take

1 six years to see a return on that -- seven years; I'm sorry,  
2 to see a return on that investment, correct?

3 A I believe that's what we have stated, yes. Yes.

4 Q The company has invested approximately \$915 million  
5 into getting the Endurance just where it is right now, right?

6 A Right.

7 Q And the company has only sold the Endurance to five  
8 unique purchasers, correct?

9 A We paused production and stopped -- yes. We paused  
10 production shortly after the dispute became -- shortly after  
11 the filing we paused production. So, yes, it is five unique  
12 customers.

13 Q All right. Since the Endurance was commercialized, so  
14 brought to the commercial market in 2022, you sold less  
15 than 40, correct?

16 A Correct.

17 MR. WHALEN: Nothing further, Your Honor, other  
18 than to say I should've said fewer than 40, but no further  
19 questions.

20 THE COURT: All right. Thank you. Anything  
21 further, Mr. Zakia?

22 MR. ZAKIA: One question, Your Honor.

23 RECROSS-EXAMINATION

24 BY MR. ZAKIA:

25 Q Mr. Hightower, does the amount of investment for the

1 time to recoup a positive ROI on that investment for the  
2 Endurance, is that unusual when compared to other new vehicle  
3 programs?

4 A No it is not unusual. The amount of investment is not  
5 unusual or the time to recoup it.

6 MR. ZAKIA: Thank you, Your Honor.

7 THE COURT: All right. Thank you, Mr. Hightower.  
8 You may be excused.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Well, how long do the parties think  
11 they need for argument? Excuse me. I assume the debtor  
12 has -- does the debtor have any witnesses, other than the  
13 declarations --

14 MR. ZAKIA: So --

15 THE COURT: -- that were moved?

16 MR. ZAKIA: No, Your Honor. Mr. Finger's  
17 declaration has already been admitted into evidence and that  
18 was our only additional witness.

19 MR. WHALEN: Your Honor, briefly on that, I  
20 believe you should be -- your chambers should be receiving  
21 any minute the declaration of designations of Mr. Finger.  
22 Those are combined designations. They're -- I believe  
23 they're fairly limited that will come up in summation, but we  
24 would submit those into evidence in lieu of Mr. Finger's live  
25 testimony as well.

1                   MR. ZAKIA: And as Mr. Whalen indicated, that  
2 includes -- what Your Honor will be receiving includes theirs  
3 and our counters as well.

4                   THE COURT: And this is designations of his  
5 deposition?

6                   MR. WHALEN: Yes, Your Honor.

7                   THE COURT: All right. I thought that was the one  
8 I couldn't open but do the parties want to take a short break  
9 or a longer break to hear argument then?

10                  MR. MURPHY: Your Honor, Matt Murphy, of Paul  
11 Hastings, on behalf of the movant, Foxconn.

12                  I think we're fine with either. I think you  
13 started to ask how long we will need. I think that probably  
14 depends on how fast or slow I talk. So maybe pace it about a  
15 half-an-hour for close, based upon what we've learned here  
16 today.

17                  THE COURT: Mr. Zakia or Mr. Lauria, how long will  
18 you be?

19                  MR. LAURIA: Your Honor, I think I probably need  
20 about 15 minutes.

21                  THE COURT: All right. Then why don't we do this?  
22 Why don't we take a 15-minute break now and then we'll just  
23 go straight ahead into argument?

24                  MR. LAURIA: Great. Thank you, Your Honor.

25                  THE COURT: All right. The hearing will remain

1 open but you can all mute yourselves and your videos.

2 All right. We'll stand adjourned then until  
3 about 20 of 1:00. Thank you.

4 (Recess taken at 12:22 p.m.)

5 (Proceedings resumed at 12:46 p.m.)

6 THE COURT: All right. This is Judge Walrath and  
7 we're back on the record in the Lordstown matter and I'll  
8 hear argument.

9 Mr. Murphy, do you want to go first?

10 MR. MURPHY: Excellent. Great. Thank you, Your  
11 Honor. For the record, Matt Murphy, of Paul Hastings, on  
12 behalf of Foxconn.

13 We are here before Your Honor to present our  
14 motion to dismiss or convert these Chapter 11 cases.

15 I realize that you are intimately familiar with  
16 the legal standards, given your recent Opinion in AIG. But,  
17 for the record, under 1112(b), on request of a party in  
18 interest, a court may dismiss or convert a case, whichever is  
19 in the best interest of the creditors and the estate, if the  
20 movant establishes cause. As Your Honor knows, 1112(b) (4)  
21 provides a non-exhaustive list of what may constitute cause  
22 for dismissal or conversion.

23 As set forth in our papers, we believe these cases  
24 should be dismissed or converted for two primary reasons.  
25 First, the fact that the debtors have failed to demonstrate

1 that they filed their petitions in good faith and for a valid  
2 bankruptcy purpose. Second, the cases should be dismissed or  
3 converted under Section 1112(b)(4)(a) because the evidence  
4 establishes that there is a substantial and continuing loss  
5 being suffered by the debtors and the debtors, by their own  
6 admission, have no prospects for rehabilitation.

7 So turning to the good faith requirement, as this  
8 Court stated in AIG, a threshold issue in determining a  
9 debtor's eligibility to file for bankruptcy is whether it has  
10 been filed in good faith.

11 The Third Circuit says, once the issue of good  
12 faith is at issue, the burden falls upon the bankruptcy  
13 petitioner to establish that the petition was filed in good  
14 faith. Whether it's been satisfied is a fact-intensive  
15 inquiry in which the court must examine the totality of the  
16 facts and circumstances. And while not constrained to any  
17 particular fact pattern, the Third Circuit, as set forth in  
18 Integrated Telecom, focuses primarily on the extent to which  
19 a debtor can establish (1) that its petition serves a valid  
20 bankruptcy purpose, including by preserving a going concern  
21 or maximizing the value of the estate and (2) that the  
22 bankruptcy cases were not otherwise filed to obtain a  
23 tactical litigation advantage. So let's jump into those.

24 The valid bankruptcy purpose. The debtor's  
25 arguments on the valid bankruptcy purpose has shifted a bit

1 over time, Your Honor. At the First Day hearing, it was  
2 primarily about blaming Foxconn for the company's demise and  
3 then a brief mention of Karma and a description of the  
4 associated securities litigation. I encourage the Court to  
5 read a press release from June 27. It was pretty heavily  
6 focused on the complaint against Foxconn.

7 At the Second Day hearing, shortly after we filed  
8 our motion to dismiss, it seemed to me that there was an  
9 attempt to identify a valid bankruptcy purpose and so the  
10 debtor's explained the rationale and identified three key  
11 points; the marketing and sale of the assets, which we've  
12 talked a lot about, centralizing the claims before a single  
13 court, and, of course, Foxconn.

14 Although today's examination, and I would submit  
15 that both parties are a little bit guilty of this, but  
16 Mr. Zakia certainly seemed intense on refocusing the issue on  
17 blaming Foxconn, but let's focus on the marketing and the  
18 sale of the assets.

19 First, whether the sale process was conducted pre-  
20 petition or post-petition, it was going to be a challenge to  
21 find buyers who would want to buy this business. There has  
22 been a consistent message in the public filings over the  
23 years that LMC was losing significant amounts of money and  
24 had, at best, an uncertain future. We referenced the going  
25 concern opinion earlier today. Mr. Ninivaggi testified to it

1 and the doubts on the ability for the company to continue is  
2 a going concern.

3           These concerns -- they continued to acknowledge  
4 these concerns even after the agreements were reached with  
5 Foxconn and Foxconn Investments, stating in their 10-Q for  
6 the quarter ended March 31st, 2022, that, "Even if the  
7 Foxconn transactions are consummated in accordance with the  
8 current terms, the company would still need additional  
9 funding to execute its 2022 business plan and achieve scaled  
10 production of the Endurance."

11           In its Form 10-K for the year ended December 31st,  
12 2022, LMC identified that, even with an investment in the  
13 much needed hard-tooling, the chances of success were  
14 uncertain stating that, "Even if we are successful in  
15 developing our high-volume manufacturing capability and  
16 processes, in conjunction with Foxconn and then reliably  
17 sourcing our component supply, we cannot assure that we will  
18 be able to do so in a manner that avoids significant delays  
19 and cost overruns, including as a result of the factors  
20 beyond our control."

21           The struggles of the cash intensive business were  
22 supported in testimony provided by Mr. Ninivaggi and Mr.  
23 Hightower today. They described that they were unable to  
24 raise the necessary capital to ensure its long-term  
25 existence; hence the going concern opinions.

1           They described the headwinds in capital markets.  
2 They described the difficulties for start-ups, the litigation  
3 overhang, litigation overhang that negatively impacts the  
4 capital rate -- that negatively impacts the capital rate  
5 continues to today.

6           It was admitted that the funding -- that funding  
7 would be needed above and beyond the amounts in the  
8 investment agreement; that we would "definitely need to raise  
9 more money." The point of this is that this business today  
10 remains just as capital intensive as it was over the last few  
11 years. And why is so much investment needed? How does that  
12 play into the sale process that we're talking about? We  
13 talked about the bill of materials, or the BOM.

14           Mr. Hightower testified that the bill of  
15 materials, or BOM, for the Endurance was over 200,000 in 2001  
16 and is now about 186,000. It sells for -- the Endurance  
17 sells for \$65,000. That's approximately three times less  
18 than the cost to build.

19           We talked about the tooling, how LMC has soft-  
20 tooling and needs hard-tooling; soft-tooling, cheaper, low-  
21 volume product, but that's about two-thirds of the tooling  
22 that LMC has. Hard-tooling, more expensive, high volume,  
23 longer life cycle. That's about a third of the tooling.

24           Mr. Hightower testified that they were going to  
25 look to bring on an OEM partner to help defray the costs of

1 the acquisition of the hard-tooling to -- and scale the  
2 Endurance. But it's a difficult proposition when you go to a  
3 partner and you ask to enter into an agreement to acquire  
4 hard-tooling when you're producing -- you sold two cars in  
5 2022. You sold a total of 65, a far cry from the 100,000  
6 promised by the end of 2023 in the prior public filings.

7 Mr. Hightower testified that they were not going  
8 to be able to scale the Endurance without an OEM partner.  
9 Jeffrey has also made clear the difficulty of selling these  
10 assets. After acquiring the LMC assets, a purchaser would  
11 look forward to an 18-month plan and an investment of 3 to  
12 500 million both in hard-tooling, engineering, and moving  
13 production costs.

14 Mr. Ninivaggi testified that about 2 to 250  
15 million would be needed for the hard-tooling. Both the CIM  
16 and Mr. Hightower mentioned that this could provide an  
17 attractive return over seven years.

18 Mr. Finger -- and I just want to make clear I'm  
19 not a litigator. I mean I pretend to be one but -- so I  
20 don't want anybody to think that just because his testimony  
21 is designated that means less, right? I think --

22 THE COURT: No. I know.

23 MR. MURPHY: -- his testimony is very important  
24 today.

25 THE COURT: I did read --

1 MR. MURPHY: Mr. Finger --

2 THE COURT: I did read it during the break, so.

3 MR. MURPHY: Excellent. Excellent. So then you  
4 will recall that he testified that bidders dropped out  
5 because of the additional capital that would be needed to  
6 continue to develop and grow the Endurance and the fact that  
7 the story around the situation was challenging and the EV  
8 space was challenging, a highly competitive space. He  
9 testified that the business has partially shuttered itself  
10 and that proposes a challenge in a sale process.

11 It's my understanding, by the way, based upon the  
12 testimony of I believe of Mr. Hightower, that it's -- I don't  
13 know what shuttered means, so maybe shuttered and a pause in  
14 production means the same thing. Rest assured, it's not  
15 coming along.

16 Mr. Hightower also testified that there have only  
17 been five unique customers and less than I guess 40 vehicles  
18 actually sold, as opposed to produced.

19 It -- to me, it's not a surprise that there was  
20 difficulty in filing [sic] a partner, OEM or otherwise, and I  
21 think that feeds into the difficulty of the sale process.

22 Was -- is this a legitimate sale process is my question.

23 One could argue that Foxconn made the most sense  
24 as a buyer given that the battery line and wheel hub motor  
25 line was located within the facility that Foxconn now owns in

1 Lordstown, Ohio. Those are lines, by the way, that,  
2 according to Jeffries, would take six to eight months to  
3 move.

4 Mr. Finger testified that Foxconn submitted a  
5 prior bid -- that the fact that Foxconn submitted a bid prior  
6 to the petition date and their knowledge of the business,  
7 they would be an actual bidder for the business.

8 But even if we're a natural bidder, even if  
9 Foxconn is a natural bidder, doesn't mean Foxconn was  
10 interested in the business. The debtors mischaracterize  
11 Foxconn's interest in the assets. They assert in their  
12 objection that rather than honor its contractual obligations,  
13 Foxconn proposed an alternative transaction and then, as was  
14 their strategy, tying the asset sale to potential litigation,  
15 the debtors further assert that, for months, the debtors  
16 tried to reach a "consensual resolution of the parties'  
17 disputes."

18 There's a few things to note here. The debtors  
19 wanted to sell Foxconn the assets but Foxconn wasn't  
20 particularly interested and Foxconn certainly wasn't  
21 interested in a shakedown based upon disputes that LMC has  
22 created.

23 I'm not privy to all the back and forth between  
24 Foxconn and LMC but I can tell you when I learned of it --  
25 all of it. On April 14th, I had a call with Mr. Lauria and

1 some of his colleagues about the potential transaction,  
2 including a potential bankruptcy filing. This is when I  
3 learned that LMC was looking for a way to wind down and they  
4 wanted Foxconn to be a part of it.

5 I'm not aware of any document in evidence  
6 supporting the assertion that Foxconn made a proposal to  
7 acquire these assets as part of a bankruptcy in April, as Mr.  
8 Ninivaggi testified, and that would be a surprise to me,  
9 considering in late April or early May, we had to advise our  
10 client on what the heck a 363 sales process was. What is a  
11 plan of reorganization. So maybe it's possible. I haven't  
12 seen it.

13 If I can, Your Honor, and I know you admonished my  
14 colleagued, Mr. Whalen, which seems to be a popular thing for  
15 people to do, I just want to walk through very quickly using  
16 a demonstrative, comparing the framework that was sent to  
17 Foxconn by LMC on I guess May 25th and compare that to  
18 Foxconn's proposal submitted to LMC, and I promise to be  
19 brief. I just want to highlight a few things if we can bring  
20 that up.

21 THE COURT: Okay. Do they still have shared  
22 screen?

23 MR. MURPHY: Oh, it's -- so Angelica Giogowski is  
24 going to put the slide up, so I think if we can provide her  
25 access.

1                   THE COURT: Okay. She should have it now.

2                   MR. MURPHY: She's right across the hall, so I'll  
3 share on from afar.

4                   THE COURT: There you go.

5                   MR. MURPHY: Okay. Perfect. So this, on the left  
6 is the transaction framework for discussion, as provided to  
7 Foxconn, and then on the right is our offer. We can go to  
8 the next slide, Angelica.

9                   So the requested framework suggests acquiring  
10 substantially all of the assets in the core engineering team  
11 for a waiver of the first tranche of preferred stock and a  
12 cash payment.

13                  On the right, you see the letter proposes  
14 acquiring substantially all of the assets of LMC and offering  
15 employment to the core engineering team in exchange for a  
16 waiver of the \$30 million in preferred equity and 42.7  
17 million in cash, 77.2 million. Next slide, please, Angelica.

18                  The framework suggests the transaction to be  
19 implemented through a pre-arranged Chapter 11 proceeding that  
20 would include a competitive sale process. The letter  
21 proposes affecting the proposed transaction pursuant to a  
22 Chapter 11 plan of reorganization pursuant to which Foxconn  
23 will acquire, subject to a competitive sale process the  
24 acquired assets or substantially all the assets. Next slide,  
25 please.

1           The proposed framework then attempts to create  
2 leverage by threatening Foxconn and asserting the disputes  
3 with Foxconn have somehow caused the image to a business that  
4 has had a going concern opinion issued since the end of 2020,  
5 saying, in the alternative, the parties will face the  
6 prospect of litigation. Not surprisingly, at the end of the  
7 letter, there's a request for relief and the request is a  
8 hope of finally putting an end to the constant threats of  
9 litigation.

10           The point here is that Foxconn -- it took time  
11 because Foxconn didn't know how to react to this unsolicited  
12 concept. But, ultimately, did exactly what LMC wanted and  
13 apparently it wasn't enough. They ignored the offer of \$77  
14 million for their assets. We can take this down, Angelica.  
15 Thank you. They ignored the offer for \$77 million and  
16 decided to take a chance at a bankruptcy filing and now  
17 they're running a sale process and trying to sell an asset  
18 class that requires up to \$500 million more in an investment.

19           As established, there isn't a business to sell  
20 here. The company has left no stone unturned in trying to  
21 cap the debt markets, capital markets, entering into  
22 arrangements with OEMs or any other partner. There's no  
23 interest. They were convinced they could shake down Foxconn  
24 out of court. Foxconn was moving too slowly and not agreeing  
25 to give the debtors what they wanted so they decided to turn

1 up the leverage. They filed for bankruptcy and day one to  
2 Foxconn for no other reason than to obtain a tactical  
3 litigation event, which we'll get to.

4 And as an added bonus, they've been able to use  
5 the Bankruptcy Court as their public forum to point out a  
6 scapegoat. This all could've been out of court, all could've  
7 been done out of court, especially now that Karma's been  
8 resolved it can be done out of court.

9 We've heard the mantra that there's a need for a  
10 free-and-clear order and that that's enough to justify this  
11 sale process. Well, that's certainly -- and I'm not telling  
12 anybody on this call anything they don't know. That's  
13 certainly a common refrain to justify a 363 sale in many  
14 other cases. It's simply not applicable here. There is no  
15 evidence in the records to suggest there is an interest,  
16 "interest" that exists that mandates a need for a free-and-  
17 clear order, including the testimony from Mr. Finger. His  
18 testimony fails to point to a single -- point out a single  
19 "interest" that would need to be addressed through a free-  
20 and-clear order.

21 Mr. Finger testified that he is not aware of any  
22 liens on the debtor's assets. Mr. Finger testified that he  
23 is not aware of any other "interests or encumbrances" that  
24 would be affected by a free-and-clear sale. Mr. Finger  
25 testified that the company doesn't have any funded debt.

1 Mr. Finger simply pointed to the Karma in the securities  
2 litigation as reasons to file for bankruptcy. Karma has been  
3 resolved. The securities litigation has no bearing on the  
4 sale of these assets.

5 Mr. Finger testified that he was speculating that  
6 parties would not bid outside of bankruptcy. In other words,  
7 in this case, he doesn't know. In addition to Mr. Finger's  
8 testimony are the schedules of statements. They don't  
9 reflect any secured claims. I think three are listed in an  
10 amount of zero.

11 There's a blanket statement in the declaration  
12 provided by Mr. Finger that says, "distressed -- buyers of  
13 distressed assets typically desire and often insist on a  
14 Section 363 sale order in order to provide the certainty of a  
15 court order and also minimize the risk of subsequent  
16 challenges to the sale." Without an assessment of the facts  
17 and circumstances of a particular case or evidence in the  
18 record, this blanket statement should not be counted.

19 Mr. Finger wouldn't have known whether a buyer  
20 would've been interested pre-petition; in other words,  
21 without the benefit of a 363 sale order, because, as he  
22 testified, he was not retained to market the assets on a pre-  
23 petition basis.

24 It's worth noting, by the way, that Mr. Finger was  
25 also not asked to evaluate Foxconn's pre-petition proposal

1 for the Board of Directors as its investment banker.

2           The Court, in Integrated Telecom, did not find a  
3 sale inside a Chapter 11 and the oversight and protection  
4 related thereto to be a valid reorganizational purpose,  
5 particularly when the assets were not appropriately marketed  
6 on pre-petition basis. In that case, the marketing was  
7 deficient and focused on insiders. In this case, there  
8 weren't any market -- there was no marketing at all.

9           So where are we in the sale process? Let's look  
10 at the Finger declaration. He says in paragraph 10, all  
11 potential bidders that have submitted an IOI appear to be  
12 proceeding forward with a potential sale process. Two  
13 potentials and an appear in one sentence.

14           In paragraph 11, he says, while it is impossible  
15 to know what the outcome of the sale process will be, it is  
16 ongoing and the debtors have a chance to preserve the value  
17 of its business and capture that value for the benefit of  
18 stakeholders. It is ongoing and they do have a chance. But  
19 there is -- there's no testimony that a sale of assets out of  
20 court could not be accomplished or should not be  
21 accomplished.

22           No stalking horse bidder has emerged. Look, it's  
23 possible that there's no going concern sale at all; that  
24 these assets are, instead, sold off in parts for amounts that  
25 are less than the costs of the case; certainly, I would guess

1 for less than the \$77 million of consideration Foxconn was  
2 willing to provide on June 22<sup>nd</sup>.

3 Moving on to the second stated reason to justify  
4 the bankruptcy filing, the centralization of the claims. The  
5 debtors refer to it as a need and a valid bankruptcy purpose.

6 As an initial matter, the Third Circuit, in 15375  
7 Memorial Corp., noted that, "The creation of a central forum  
8 to adjudicate claims against the debtors is not enough to  
9 satisfy the good faith inquiry. The debtors must show that  
10 bankruptcy has some hope of maximizing the value of the  
11 debtor's estates."

12 Let's look at the claims though. Let's start with  
13 Karma. The debtors tried to shake down Karma as well. I  
14 mean they started off -- the vigorously opposed lifting the  
15 stay, they attempted to rip up two years of litigation and  
16 estimate Karma's claim, and they were ultimately unsuccessful  
17 and a settlement was reached a short time thereafter.  
18 Frankly, it could've been reached outside of court as well.

19 The remaining litigation is all securities related  
20 litigation. Similar to the situation in the Integrated  
21 Telecom case, the inescapable conclusion from the record is  
22 that these class actions; there's that word, these securities  
23 litigate -- the securities litigation, I'll say, do not  
24 threaten any value of LMC that the Chapter 11 is seeking to  
25 preserve.

1           A little more detail in brief. Most of this is  
2 taken from testimony from Mr. Ninivaggi. Some of it is  
3 publicly available, but just high level.

4           The Ohio securities class action has been fully  
5 briefed for nearly two years and is awaiting the court's  
6 scheduling of a hearing and ruling. It's our understanding  
7 that settlement discussions are indeed ongoing. A Delaware  
8 securities class action; the debtors are not defendants, they  
9 have been required to provide them the discovery. My  
10 understanding the insurance is covering the costs associated  
11 with that class action.

12           The derivative cases, the Northern District of  
13 Ohio, the District of Delaware, the Delaware Chancery Court,  
14 my understanding that those are -- there's evidence in the  
15 record that those are all stayed pending resolution of the  
16 Ohio securities class action motion to dismiss. In any  
17 event, those are all claims on behalf of the company for the  
18 benefit of the stakeholders.

19           The SEC investigation, the debtors received a  
20 settlement offer from the SEC five to six months ago but  
21 haven't responded but, depending on the SEC's approach, the  
22 SEC could continue its investigation on a post-petition basis  
23 the same way it had on a pre-petition basis. There's nothing  
24 about this Chapter 11 that changes the dynamic with the SEC.  
25 So what's the point? The point is there's a thing about

1 these claims that require consolidation before this Court.  
2 In some cases, the litigation has been stayed. In others,  
3 there's settlement discussions ongoing.

4 This is not a situation where a secured creditor  
5 is on the verge of exercising remedies or some sort of mass  
6 tort scenario. Instead, this is a situation where the debtor  
7 wanted to bring a claim, not consolidate claims against it.

8 That brings us to the third rationale for filing  
9 to address the issues of Foxconn. The debtors want to come  
10 after Foxconn. They've stated it publicly. They've stated  
11 it again here today.

12 In their examination, the debtors try to assert  
13 that the business pivot happened only because of its  
14 relationship with Foxconn. Not relevant for today but,  
15 ultimately, that will prove to be not true.

16 At this -- as it relates to this hearing, the  
17 debtors assert that Foxconn has worked to undermine their  
18 goals. With respect to LMC's two stated goals, not involving  
19 Foxconn, the sale of assets and consolidating the claims,  
20 there's simply no evidence in the record supporting the  
21 assertion that we are undermining the goals of these cases.

22 Now, I know everybody's saying it. We got this  
23 little motion to dismiss we're talking about. I'll come back  
24 to that. But, as it relates to the sale and the claims,  
25 Foxconn hasn't objected to the First Day relief. Foxconn has

1 not objected to the bid procedures. Foxconn has allowed the  
2 parties to tour the Lordstown plant. Foxconn has not  
3 objected to any retention application. Foxconn did not  
4 object to the Karma settlement. But the sale of the assets  
5 and the consolidation of the claims aren't the debtor's goals  
6 here. Their real goal is to create leverage on Foxconn  
7 through a dispute of their own creation and they want Foxconn  
8 to overpay for assets that Foxconn doesn't really want.

9                 This motion to dismiss is a defense against this  
10 improper bankruptcy filing and Foxconn has a right to defend  
11 itself in this regard.

12                 In sum, Your Honor, there's no evidence in the  
13 record to support the debtor's assertion of a valid  
14 bankruptcy purpose. Instead, only promises of anything can  
15 happen at a sale and then coordinate the blame game in an  
16 effort to shift the spotlight off the true reason why we're  
17 here.

18                 Tactical litigation advantage, let's begin with  
19 that. The Bankruptcy Code is intended to benefit those in  
20 genuine financial distress. It's not intended to be used as  
21 a mechanism to orchestrate pending litigation.

22                 Courts has dismissed bankruptcy cases where --  
23 cases where debtors filed to fabricate federal court  
24 jurisdiction.

25                 A bad faith Chapter 11 filing may occur when a

1 bankruptcy petition is filed simply to create a bankruptcy  
2 forum for a two-party dispute based upon non-bankruptcy law  
3 and no reorganization purposes intended. The posterchild for  
4 bad faith is that two-party dispute where pre-petition sale  
5 efforts have been unsuccessful. That's the Springs case.  
6 Here, there was no ability to raise financing and I think the  
7 sale efforts post-petition. We'll see how they turn out.

8                 The debtor had a long-running operating deficit in  
9 Springs, same case here, and the debtor brought  
10 quintessential state law claims in an adversary proceeding  
11 there. Same case here.

12                 Despite the fact -- and here's the issue. The  
13 agreement -- well, up until the petition date when there was  
14 a ten-count complaint filed, it's our belief that there was a  
15 dispute about the investment agreement. I guess it's beyond  
16 that. But the investment agreement, Foxconn Ventures PTE,  
17 Limited, is a party to that. But the debtors elected to file  
18 suit on the first day of these cases against all the Foxconn  
19 entities, including those not otherwise amenable to service  
20 of process outside of Chapter 11. They sued anyone and  
21 everyone and the way they could do that easily is by filing  
22 these cases. That's how they exerted their leverage. That's  
23 how they're trying to get us to pay more money for assets  
24 that we don't necessarily want.

25                 This is an obvious abuse of the bankruptcy system

1 but the debtors have disguised this with what they're calling  
2 a "going concern sale process."

3 The evidence has shown -- Mr. Hightower testified  
4 that LMC approved the lawsuit against Foxconn in conjunction  
5 with the bankruptcy filing. He testified that LMC made the  
6 decision to file for bankruptcy and to Foxconn prior to  
7 receiving the offer solicited from Foxconn.

8 Mr. Ninivaggi testified that there was no reason  
9 to sue Foxconn on the first day. There wasn't.  
10 Mr. Ninivaggi -- as it relates to the Foxconn bid itself, by  
11 the way, Mr. Ninivaggi and Mr. Hightower testified about the  
12 concerns they had with the bid and it's conditionality, about  
13 the need to do diligence is a red flag I think is what they  
14 said. The reason diligence needed to be done is because  
15 Foxconn just didn't really know whether it was interested in  
16 the assets, but here's the interesting part. Everybody's  
17 still doing diligence. Jeffries testified that virtually all  
18 the bidders are still conducting diligence. I'm still  
19 surprised that Jeffries testified that they weren't brought  
20 in to evaluate the offer.

21 So what does all this mean? Why the bankruptcy, I  
22 guess. That's the question, right? Because it provides them  
23 the narrative they want in terms of blaming Foxconn. They  
24 want to create leverage, as I mentioned. Pay big money, buy  
25 yourselves out of a dispute that we created. This was never

1 about maximizing value received in exchange for the assets,  
2 and we'll find out because, at some point, we're going to  
3 compare that 77 million against what comes in.

4 Now let's turn to -- I'm sorry. Before turning  
5 to 1112(4)(a), I just want to touch very briefly on financial  
6 distress. Angelica, if you can throw up the -- put these  
7 slides on financial distress, please. Great. Thank you.

8 So here, it's just -- it's a simple slide of the  
9 schedules, showing the assets and liabilities of the debtors,  
10 the three debtor entities.

11 SGL Carbon found that -- SGL Carbon states, "No  
12 immediate financial difficulty and concluded that SGL  
13 Carbon's ability to meet its debts, among other reasons,  
14 compelled the conclusion that it did not enter Chapter 11  
15 with a valid bankruptcy purpose. I think it's a valid  
16 reorganizational purpose, actually.

17 Similarly, in Integrated Telecom, the court  
18 ordered dismissal of the Chapter 11 case where the debtor  
19 entered bankruptcy not with the intent to reorganize, but the  
20 purpose of selling a fully solvent company. Next slide,  
21 please, Angelica.

22 As you can see here, from a balance sheet  
23 perspective, solvent. The debtor's assets exceed their  
24 liabilities. Next slide, please.

25 Where are we from a cash flow perspective? We'll

1 go over the 13-week in a minute. They were able to meet --  
2 satisfy their liabilities as they were coming due and were  
3 going to be able to do so into the future, but what this  
4 slide shows is that if you take the cash that was available  
5 and you back out the claims as we know them from two slides  
6 ago and you back out the litigation reserve and we do this as  
7 of the petition date, and the litigation reserve as of the  
8 petition date was \$35.9 million, you have available cash of  
9 \$84.2 million. Clearly enough to make a distribution to  
10 equity. If you factor in Karma, that takes you down to 44.2,  
11 but Karma wasn't settled until post-petition.

12 Mr. Ninivaggi testified, I believe, that absent  
13 something unforeseen on the claims pool, there would be a  
14 distribution available for common equity.

15 I'm going to move on to 1112(b)(4)(a), Your Honor.

16 Foxconn also believes that cause exists  
17 under 1112(b)(4)(a) because there is substantial or  
18 continuing loss of value to the estate and there is an  
19 absence of reasonable likelihood of rehabilitation.

20 In terms of substantial or continuing loss of  
21 value to the estate, I think the parties in the briefing  
22 agree that you should look to the track record of the debtor  
23 to determine if it's suffering losses or making gains.

24 In this regard, the track record is clear. The  
25 debtors always have and continue to operate at a significant

1 loss. Well before the debtors ever discussed or entered into  
2 an agreement with Foxconn, they were making their going  
3 concern qualifications in their public filing.

4 Mr. Ninivaggi acknowledged at his deposition, even  
5 with the contemplated arrangement with Foxconn, the company  
6 was still facing significant challenges with production,  
7 financing, and its then outstanding going concern opinion. I  
8 think he even said that Foxconn wasn't a silver bullet.

9 There was a presentation to the Board of Directors  
10 less than two months before the bankruptcy filing that drives  
11 home the point of the substantial continuing loss, Your  
12 Honor. It's found at Exhibit 12 I think in your binder. I  
13 was going to put this up. I'm not going to. There were  
14 concerns about confidentiality and I want to honor those.  
15 But I just want to make a few points as it relates to this  
16 particular slide.

17 This is a presentation of management to the Board  
18 of Directors dated April 21st, 2023, so less than -- just  
19 about two months -- just over two months before the filing,  
20 and it acknowledges, in bullet 2, the significant challenges  
21 and that management anticipates it will require at least  
22 500 million in additional funding to scale production of  
23 Endurance.

24 It also mentions that it's unlikely that LMC will  
25 be able to raise any additional financing in the third

1 bullet.

2           In the fourth bullet, it references the investment  
3 agreement and it acknowledges that additional financing  
4 remains subject to closing conditions and may not be  
5 forthcoming.

6           In the next bullet, there's an acknowledgment of  
7 the cash burn that's ongoing and that without a strategic  
8 transaction the company's cash position would continue to  
9 erode. It's worth noting, at that time, it was 176 million.

10           And then the last bullet, it mentions that, in  
11 light of all of this, the company and Foxconn, they've  
12 started discussions about the possibility of Foxconn  
13 purchasing the company's assets at a price that would make --  
14 that would pay creditors in full and provide a return to  
15 equity. That opportunity was there, but it wasn't enough.

16           Let's take a look at 13-week cash flow forecast.  
17 This I think we can put up.

18           And, Angelica, hopefully, this is the one that --  
19 yeah, perfect. Thanks.

20           So a few points I want to make here is the debtors  
21 project a cumulative negative cash flow of nearly 17 million  
22 for the week of July 29th, 2023, through and including the  
23 week of October 28th, 2023. This includes, by the way, 2.1  
24 million vehicle sales the week ending August 5th that I don't  
25 believe will be reoccurring.

1           If you back out -- if you roll this forward a  
2 week, if you back out, the vehicle sales in week one, the  
3 operational burn for this company over the next 13 weeks in  
4 this forecast is over \$7.5 million. That's operational burn;  
5 that has nothing to do with professional fees.

6           We heard testimony that the projected monthly cash  
7 burn is over six million per month. That doesn't include  
8 fees for the creditors committee or its advisers or, heaven  
9 forbid, if we feel compelled to appoint a creditor and equity  
10 committee. This is over a million dollars, that burn of  
11 six -- over six million is a million higher than the  
12 prepetition cash burn noted in the first day declaration.

13           In terms of bankruptcy expenditures of 1.1 to  
14 \$1.2 million, that amount doesn't include the 20 percent  
15 holdback. That brings it to almost \$13.5 million during  
16 these 13 weeks, that's a million dollars a week. Even I can  
17 do that math. Over -- the professional fees are over \$8  
18 million greater than the operating expenses, \$2 million greater  
19 than the payroll and operating expenses combined.

20 Mr. Ninivaggi testified that the bankruptcy filing net-net  
21 increased the legal spend because of the bankruptcy costs.

22           This case is distinguishable from Your Honor's  
23 ruling in AIG. There, you denied relief because the debtor  
24 established that it was not experiencing substantial losses  
25 where the debtor's Chapter 11 case had reduced expenses by

1 eliminating interest due on a \$37 billion revolving credit  
2 facility. Stopping the interest accrual on that would  
3 certainly save some money. The filing also paused the  
4 Connecticut litigation.

5                 Here, the following has happened. The debtor  
6 wanted to pause the Karma litigation, but that failed. It  
7 settled, not an issue anymore. The securities class actions  
8 and the derivative claims have all been stayed pending the  
9 outcome of the Ohio securities class action. There's no  
10 evidence in the record suggesting the SEC investigation is  
11 any less of a cost or an intrusion now than it was before.

12                 In addition, another distinguishing feature is  
13 that the debtor in AIG had filed a plan on the petition date  
14 and was prepared to toggle it, toggle to it if a 363 sale  
15 process fell flat. A plan hasn't been filed in these cases.  
16 I'm sure a plan will be filed soon, I -- maybe it was -- you  
17 know, we'll see what's in it; I guess we'll see third party  
18 releases in it. Here, unlike AIG, the 13-week cash flow and  
19 the debtors' admissions establish that these cases have  
20 exacerbated the debtors' negative cash flow and losses, after  
21 having already implemented certain operational cost  
22 reductions, as testified by Mr. Ninivaggi earlier today.  
23 Those were all done out of court.

24                 The filing of these cases and the automatic stay  
25 didn't help reduce the burn, for example, no need to make an

1 interest payment on a secured credit facility; rather, it  
2 massively increased the cash burn. Whatever costs existed  
3 prepetition that could have been reduced have been reduced  
4 and they could have -- and that happened without the  
5 necessity of increasing the costs because of this bankruptcy  
6 filing. It is axiomatic that a negative cash flow situation  
7 alone is sufficient to establish a continuing loss or  
8 diminution to the estate for purposes of 1112(b) (4) (A),  
9 that's in Loop Corp.

10                 And then, finally, and mercifully for many of you,  
11 there is no evidence of a reasonably likelihood of  
12 rehabilitation. The evidence suggests that there's virtually  
13 no likelihood for rehabilitation. Mr. Hightower testified  
14 that they weren't doing scale production of the Endurance  
15 unless they found an OEM partner. Mr. Finger testified to a  
16 partially-shuttered business. We've heard that production  
17 has been paused.

18                 From a legal perspective, the debtor is  
19 mischaracterizing our arguments in their brief on this issue,  
20 so I'll clarify. Foxconn acknowledges that it's possible for  
21 a liquidation to be a valid form of rehabilitation, but only  
22 in the event that the liquidation follows a sale process that  
23 realizes value that would not be available outside of a  
24 bankruptcy. Here, the sale could have been done outside of a  
25 bankruptcy at a fraction of the costs that these estates are

1 now incurring. There is no need for a free-and-clear order.  
2 There is, I would submit, almost no prospect of a sale as a  
3 going concern, this is a liquidation.

4 Your Honor, that concludes my argument. I'll  
5 answer any questions. I respectfully request that this Court  
6 either dismiss these cases or convert them. In terms of  
7 timing, if Your Honor is not inclined to dismiss, I'd  
8 respectfully request the Court to delay ruling on conversion  
9 until after the bid deadline, so the Court has the benefit of  
10 seeing what bids have been submitted.

11 THE COURT: All right. Thank you.

12 Mr. Lauria?

13 MR. LAURIA: Good afternoon, Your Honor, Tom  
14 Lauria from White & Case, I'm here to speak on behalf of the  
15 debtors.

16 As Counsel properly notes, the Foxconn motion  
17 seeks dismissal or conversion for cause and, in pursuing that  
18 relief, they make two arguments. Number one, that the case  
19 has been filed in bad faith. And, in support of that, they  
20 argue that there's no legitimate bankruptcy purpose behind  
21 the filing and it is solely to obtain a tactical advantage in  
22 a two-party dispute.

23 Separately and secondly, they argue that the  
24 debtor is suffering substantial and continuing losses and  
25 diminution in value, and that there's no reasonable

1 likelihood of rehabilitation.

2                   Putting these two arguments side by side is kind  
3 of interesting. The first one is really that we're too  
4 solvent for bankruptcy; the second one is that we're too  
5 insolvent for bankruptcy. In other words, according to  
6 Foxconn, the Court has to make a decision not unlike the one  
7 Goldilocks had to make when she was choosing which soup to  
8 eat; not too hot, not too cold, just right. Your Honor, I  
9 submit that the decision to file bankruptcy is not passed  
10 through such a narrow path. Their arguments rely on a  
11 misinterpretation of the law that are unsupported by fact

12                   (Indiscernible) I'd like to address one thing. I  
13 feel that Foxconn is conflating and confusing the cause of  
14 the bankruptcy versus the purpose of the bankruptcy. Today,  
15 Foxconn is saying that because we think that their breaches  
16 of our various agreements caused the bankruptcy, that that  
17 somehow means that the purpose of the bankruptcy is improper.  
18 Your Honor, that's no different than Hertz Rent-A-Car saying  
19 it filed bankruptcy due to the impact of the COVID pandemic  
20 and Foxconn filed due to the breaches of a contract it had  
21 with a third party.

22                   The fact that we have someone to sue and that  
23 Hertz did not is of no matter. In fact, all of this evidence  
24 about the disputes between Foxconn and the debtor, I think,  
25 is a sideshow, and what it does is it confuses two important

1 issues, what do we think was the cause of the bankruptcy,  
2 what put us in a position where we had to file for Chapter 11  
3 relief, and what is the purpose of the Chapter 11 case.

4 Looking at the law, we obviously agree with  
5 Foxconn on a couple of threshold points. One, the  
6 determination is within the Court's sound discretion and,  
7 number two, it's to be based on a fact-intensive inquiry.  
8 Where we do not agree is we believe the cases stand for the  
9 proposition that dismissal is only to be applied in a case  
10 where you have egregious circumstances. Where we do not  
11 agree is the fact -- the mere fact that the bankruptcy case  
12 may provide a tactical benefit in the litigation -- and it's  
13 entirely unclear here whether it will -- is not sufficient,  
14 it must be the sole intention. Moreover, where we also do  
15 not agree is that the reorganization purpose includes an  
16 orderly -- pursuit of an orderly liquidation.

17 Now, Counsel backed away from that position today  
18 on the record, but if you go back and reread the briefs,  
19 clearly, they have used against the debtor the fact that it  
20 recognizes that it can't really reorganize as a basis for  
21 dismissal of the case, that we have no hope of reorganizing.  
22 Counsel said that again today.

23 Now, we do agree on a number of the facts. Number  
24 one, in its current configuration, the business is not  
25 viable; number two, the business is currently losing money;

1 number three, there are multiple disputes and claims that  
2 need to be resolved in connection with the wind-down of the  
3 debtors' affairs; number four, we are conducting a sale  
4 process that is ongoing. Where we disagree is that, on those  
5 facts, the debtor is not suffering financial distress, which  
6 is Foxconn's position; we are.

7 We did not conduct, contrary to Foxconn's  
8 allegations in its papers, a two-year sale process prior to  
9 the bankruptcy. We did seek investment, all shapes and  
10 sizes, we were unable to attract it, but we did not conduct a  
11 sale process and now we're being hung for that in the  
12 argument. But, you know, the reason we didn't conduct a sale  
13 process is our agreements with Foxconn prohibited us from  
14 conducting a sale process. We would have had to breach the  
15 Foxconn agreements, which were our lifeblood, to pursue a  
16 sale process pre-bankruptcy. Only when we gave up on hope of  
17 a deal with Foxconn could we put it through a sale process in  
18 bankruptcy.

19 So Foxconn argues about the costs of our current  
20 problems. We agree that the costs associated with the  
21 attempt to get to scale production of the Endurance is a  
22 significant problem. Where we disagree is that we are  
23 unable, in fact unable to raise the capital we needed to  
24 continue with our second business line that was created as a  
25 consequence of our agreements with Foxconn because of

1 Foxconn's unwillingness to go forward with the agreement.  
2 We'll get to all that later, but the fact is this business is  
3 in distress and there are multiple reasons for it to be  
4 there.

5 This is not a two-party dispute. I think the  
6 Court has already seen that. There are multiple parties that  
7 we have disputes with and that the fact that we have  
8 subsequently resolved the Karma dispute shouldn't go in the  
9 negative box for the debtor, it should be a positive.

10 We do have continuing operations. I think that's  
11 come through in the testimony. In fact, we have 126  
12 employees and we're continuing with the Endurance program,  
13 including in particular the battery in the wheel hub lines,  
14 that we have the ability to sell those as going-concern  
15 businesses.

16 And we disagree about whether or not there's any  
17 benefit to the sale process from being in Chapter 11.  
18 Counsel can speculate all he wants about whether or not  
19 parties will pay more or pay at all without the protection of  
20 a bankruptcy court order, but I think we all know from  
21 experience that that is a level of insurance that has induced  
22 many purchasers to the table at prices where they otherwise  
23 wouldn't pay to be assured of the fact that they aren't going  
24 to have to look in the rearview mirror. It's not just a  
25 matter of stripping liens and claims, it's a matter of

1 extracting the business from a look-back, it's a matter of  
2 certainty that a transaction will close.

3 Outside of bankruptcy, how do we sell all or  
4 substantially all of the assets of the debtor? We'd have to  
5 go through the process of having (indiscernible) well, we all  
6 know that that's a complicated, expensive, and time-consuming  
7 process that may or may not get approval, depending on what's  
8 going to get to the shareholders at the end of the day.

9 Today, we're not in a position to assure the shareholders  
10 there will be a recovery to them.

11 We've got the Karma resolution behind us, we've  
12 got multiple securities class actions ahead of us, we've got  
13 the SEC investigation claim, and we've got a \$30 million  
14 preferred claim in favor of Foxconn. And we have a schedule  
15 of what we think our trade claims are. The bar date hasn't  
16 passed yet. We are in plan negotiations with the committees,  
17 I think counsel to the committee can confirm, and we're  
18 trying to come up with a number that we and they are  
19 comfortable in using for what we think the unsecured claim  
20 pot will ultimately be, but I don't think anybody is prepared  
21 to say that that number isn't at risk of rising when we  
22 (indiscernible) the bar date. We've all seen all kinds of  
23 claims come in that are above and beyond what's in the  
24 debtors' schedule.

25 So as to bad faith filing, was there no proper

1 bankruptcy purpose? I think that the evidence shows that  
2 here the board's desire was to achieve an efficient  
3 disposition of its assets and a liquidation of its  
4 liabilities in a controlled Chapter 11 process with court  
5 oversight that will ensure fair treatment of all and protect  
6 the rights, as per the Code, of all stakeholders, starting  
7 with the unsecured creditors, going to insider creditors,  
8 going to the preferred, going to the securities claims, the  
9 common stock.

10                 And let's just remember, in Chapter 11, 510(b)  
11 subordinates those security claims and makes them equal to  
12 the security on whose behalf they're brought. It's common  
13 equity. That is a key provision of the Code here that is  
14 beneficial for the estate in the reorganization process and  
15 the liquidation process that allows us to make early  
16 distributions to unsecured creditors.

17                 Outside of bankruptcy, those causes of action are  
18 *pari passu*, and we wouldn't be able to make distributions to  
19 unsecured creditors early until we had some resolution. And  
20 I think the Court knows from experience that these securities  
21 class action litigations can go on and on and on. They will  
22 eventually get past a motion to dismiss, they will eventually  
23 move forward in all likelihood. And once the insurance is  
24 spent on the Delaware action, guess how we pay for that  
25 situation? Outside of bankruptcy.

1           And we do have a definitive denial of coverage  
2 with respect to the other securities class actions, so the  
3 company is funding those litigations out of pocket. Now, is  
4 there a possibility that a dispute can be raised and perhaps  
5 we would get to a point where insurance reversed course?  
6 Yes, but today all we have is a denial of coverage.

7           But the fact is that the intention, the purpose  
8 that the evidence shows the debtors filed this case for is  
9 not only a proper bankruptcy purpose, it's a quintessential  
10 bankruptcy purpose. This is not a two-party dispute case.  
11 Sure, we've got a big dispute with Foxconn, but that's not  
12 why we filed bankruptcy; that's because of our financial  
13 situation, but it's not -- we did not file bankruptcy for the  
14 purpose of trying to get a benefit on Foxconn, and I will  
15 come back to that point.

16           The Court has already seen and Foxconn admits that  
17 we've got multiple disputed claims here: Karma, multiple  
18 securities class actions, derivative actions, an SEC  
19 investigation, we're certain to have disputed trade claims.  
20 Rather than being punished for filing for Chapter 11 relief  
21 when we have \$136 million of cash, when we think we can have  
22 the chance of making a distribution to equity -- and, by the  
23 way, the Bankruptcy Code protects equity interests every bit  
24 as much as it protects creditor interests; sure, they're at  
25 the end of the waterfall, but those are still protectable

1 interests. Ford shouldn't be punished, Ford should be  
2 commended. Ford acted earlier than so many debtors we've  
3 seen who pursued that dream to the end. Delay here,  
4 dismissal of the case would only likely result in a  
5 subsequent bankruptcy filing, less money and worse outcomes  
6 for our stakeholders.

7 Putting aside the speculation of Counsel on the  
8 record earlier and the testimony, quite frankly, of Counsel,  
9 I think what Foxconn is really saying, in the best case, they  
10 just disagree with the decision we made. But, if it was  
11 their decision to make, they would have proceeded  
12 differently. They think we should have pursued their  
13 eleventh hour letter of intent.

14 Now, the Court can go back and take a look at that  
15 letter of intent, but it was highly conditional and it  
16 required -- the only binding component of that letter was  
17 that they wanted us to agree not to file for bankruptcy  
18 protection for 30 days. They wanted us to continue the  
19 status quo for another 30 days, after on-and-off engagement  
20 and discussion for three months. The fact of the matter is  
21 the board concluded, Mr. Hightower testified, that they did  
22 not view that letter as actionable. Mr. Ninivaggi testified  
23 that he thought it was just another attempt by Foxconn to  
24 cause delay.

25 Now, that's the best case, the best

1 characterization of Foxconn's argument that they just think  
2 we made a bad decision, we should have decided otherwise.  
3 That is not a basis for dismissal of the case. But, in the  
4 worst case, what Foxconn is really doing, they're trying to  
5 pre-litigate the adversary proceeding. I think the Court saw  
6 that. It's trying to disrupt our sale process. It obviously  
7 makes it difficult to sell assets under 363 when the prospect  
8 of the case being dismissed looms. We need to get that cloud  
9 off of our heads so that we can really bring forward the best  
10 offers on the best terms for the debtors' ongoing operations  
11 and assets.

12 What Foxconn is also doing, it's kind of  
13 interesting, they're criticizing us on the one hand for the  
14 cost of the bankruptcy case, but a significant portion of  
15 that cost has been defending their motion to dismiss.

16 We do have disputes with Foxconn, there's no  
17 question about it, and they are significant and material. We  
18 believe that Foxconn's breaches materially harmed the  
19 business and put us in a position where we really had no  
20 alternative but to file. There is no evidence that that was  
21 our sole purpose or intention in filing Chapter 11. If there  
22 is a tactical benefit, and it's not clear that there is, it's  
23 tangential, at best.

24 Foxconn stating over and over and over again the  
25 conclusion that the only reason we filed was to get a

1 benefit, a tactical advantage on Foxconn, does not make it  
2 true. The fact is that the company was experiencing  
3 financial distress; it was losing money, it had no viable  
4 business plan, it faced multiple complex litigations.  
5 Continuing forward without bankruptcy protection presented a  
6 number of risks. Further denigration of value, ultimately, a  
7 race to the courthouse by our creditors. We did face a trial  
8 date in (indiscernible) September. We had other disputes  
9 that were percolating. When people start to realize that  
10 we're burning through money and that we don't have a stay in  
11 place, everybody is going to jump to get ahead of the line to  
12 collect what they're owed. And we had, we believed, an  
13 inability to preserve the operation of our existing business.  
14 Our trade counterparties were getting more and more difficult  
15 to work with. And we believed that we had no real practical  
16 ability to sell our assets other than in a fire sale  
17 liquidation outside of bankruptcy.

18              Delay would have only resulted in all of our  
19 problems getting worse and our cash shrinking, fewer  
20 distributions to creditors, maybe even impairment of  
21 creditors and no distribution to shareholders, and perhaps a  
22 multi-hundred-million-dollar judgment by Karma.

23              Your Honor, if we tick through the factors quickly  
24 that this Court has considered in JER/Jameson, citing to  
25 Primestone, I think it's obvious that a preponderance of the

1 factors do not weigh in favor of dismissing or converting.

2                 This is not a single-asset case. There are  
3 hundreds of unsecured creditors and thousands of  
4 shareholders, all of whose interests are protected by the  
5 Chapter 11 case. We do have ongoing limited business  
6 operations and over a hundred employees who are actively  
7 engaged. We were not on the eve of foreclosure, this was not  
8 a bankruptcy filed to stop a foreclosure in the eleventh  
9 hour; it is obviously not a two-party dispute.

10                We have cash to be able to pay our costs of  
11 administration and to make distributions. We were getting  
12 substantial pressure from at least one creditor in the form  
13 of the Karma litigation that we faced as of the petition date  
14 and the decision regarding dismissal is to be made on the  
15 basis of the facts and circumstances at the time of the  
16 petition. We don't get the benefit of 20/20 hindsight.

17                There was no previous bankruptcy here. There is  
18 no allegation whatsoever of any improper prepetition conduct  
19 on the part of the debtor.

20                Yes, item ten, there's no real possibility of a  
21 reorganization, but orderly liquidation is a proper  
22 reorganization purpose.

23                The debtor was not formed to file the case and the  
24 case was clearly not filed solely to access the stay to stop  
25 something that otherwise should have happened.

1           So it comes down to an assessment of the board's  
2 intent. The intent to liquidate in an orderly fashion is not  
3 evidence of bad faith. Indeed, the Code explicitly  
4 contemplates liquidation in Chapter 11. 1123(b)(4)  
5 contemplates the sale of all or substantially all of the  
6 debtors' assets under a plan. And we know, as practical  
7 people, from experience, there are numerous Chapter 11 cases  
8 that have proceeded for the purpose of implementing an  
9 orderly liquidation of the debtor's affairs.

10           Here, we soon will file a plan, as Counsel  
11 speculated. We are working actively with the committee to  
12 get to agreement on the terms of that plan, and we expect  
13 that that plan will enjoy broad creditor support.

14           Foxconn spends an inordinate amount of time  
15 putting on the case that the business was failing and can't  
16 be reorganized in Chapter 11. I just think that's a sideshow  
17 and I think it's probably part of their case pending the  
18 adversary; it has nothing to do with what's before the Court  
19 today.

20           Just because a debtor seeks to obtain the benefits  
21 of the Bankruptcy Code is not a basis for dismissing the  
22 case. Those benefits wouldn't be there if it wasn't expected  
23 that debtors would capitalize on them. Nor is it a basis for  
24 dismissal to say that the debtor is losing money. If that  
25 were really the case, how many cases that have been before

1 this Court would have been dismissed? Now, that loss of  
2 money may become relevant over time. If we are unable to  
3 propose a plan and move forward swiftly through the  
4 reorganization process, as we intend to, the ongoing cash  
5 burn may become an issue. But to try to do that upfront  
6 before we've gone through the exercise, that's not how it's  
7 played.

8 Let's just look at three scenarios, Your Honor,  
9 and I think I'm done. What happens if we continue in the  
10 Chapter 11 case? We're going to continue with our sale  
11 process. We expect to have one or more purchasers free and  
12 clear, and we have the opportunity -- and it's quite  
13 premature to say that we will, but we have the opportunity to  
14 get going-concern value for at least a part of our business.  
15 We'll propose a plan, we'll implement the Chapter 11  
16 waterfall, and it will provide for the treatment, as required  
17 by the Code, of all claims and equity interests. Unsecured  
18 non-affiliate claims we think will be at the top, after  
19 administrative expenses. Behind that would come insider  
20 claims, behind that, if allowed -- behind -- or not  
21 subordinated -- behind that would come the preferred Foxconn  
22 \$30 million, unless it's equitably subordinated, which is one  
23 of the remedies that we've sought in our adversary. And  
24 behind that comes the common, which includes securities class  
25 action claims that are automatically subordinated to become

1 and under 510(b) .

2           This plan will permit distributions to be made to  
3 unsecured creditors on a timely basis as those claims are  
4 resolved.

5           Now, let's say that we dismiss the case. First of  
6 all, we lose the committee as a negotiating vehicle to  
7 represent the interests of all of the unsecured creditors.  
8 We have everybody in one-offs, we have chaos. We have  
9 everybody getting concerned about whether or not they're  
10 going to get paid and is somebody else going to get paid,  
11 will there be money to pay them, where everybody is running  
12 to court. So you can envision claims and litigations all  
13 over the place, everybody trying to recover their claim and  
14 get to the head of the line.

15           We can't pay them because, outside of bankruptcy,  
16 the securities class action claims are *pari passu* of all  
17 those claims and they could be massive; we think they're not,  
18 we hope they're not, but we're not in a position to opine  
19 that those claims wouldn't have an impact and won't be  
20 material.

21           The assets will be liquidated fire sale-style, no  
22 doubt. We won't have the ability to sell free and clear.  
23 The litigation in millions will exhaust our insurance in  
24 Delaware. We may suffer a large judgment. It will expose  
25 all of our creditors to the risk of partial payment and will

1 expose our shareholders to the risk of no recovery  
2 whatsoever.

3 And you know what? We likely end up back in  
4 bankruptcy, three months, six months, a year down the road,  
5 just in a worse position.

6 What about a Chapter 7? Well, a Chapter 7, we  
7 stop the operations, we lose over a hundred jobs, we  
8 eliminate the possibility of obtaining going-concern release,  
9 and, importantly, in terms of the assets of this company are  
10 predominantly IP-intertwined, the Chapter 7 -- the Chapter 7  
11 trustee doesn't have the knowledge from years of work in  
12 development in that IP, it's going to have almost no ability  
13 to know what it's got or how best to dispose of it.

14 What we do is we put the estate in a position  
15 where it's not going to get going-concern value, that's  
16 foreclosed, where what we have to sell will be more difficult  
17 to sell, and all we have is a distribution in respect to  
18 claims that the Chapter 7 trustee may take ages to resolve.

19 So, Your Honor, I would just say there's no basis  
20 to dismiss the case at this time. And I think the Court  
21 should keep an eye on our process and our progress. We have  
22 settled one of the largest disputed claims, we're working on  
23 settling the others, we're working on a plan that will have  
24 committee support, we hope, and we hope to progress this  
25 process to conclusion within the calendar year. Let's remove

1 the cloud and let the debtor do its job.

2                   And we're under your oversight and supervision at  
3 all times. If things go off the rail, you'll tell us.

4                   Thank you.

5                   THE COURT: Thank you.

6                   Does the committee wish to chime in?

7                   MS. KOVSKY-APAP: Yes. Thank you, Your Honor.

8 Deb Kovsky-Apap, Troutman Pepper, for the committee.

9                   Your Honor has heard a lot of testimony elicited  
10 today that seems to really focus on whether Foxconn bears any  
11 responsibility for the debtors' ending up in bankruptcy.  
12 Respectfully, the committee agrees with the debtors that that  
13 testimony really misses the point. Whether or not Foxconn  
14 bears any culpability here, what's clear to the committee is  
15 that on the filing date these debtors clearly had valid  
16 reasons for needing the protection of Chapter 11. The  
17 company needed to sell its assets, but, as Mr. Finger  
18 testified, it couldn't do so while it was bound by its  
19 agreements with Foxconn.

20                   We heard testimony or have seen testimony in the  
21 deposition transcript of Mr. Finger's testimony that there  
22 are buyers that may well want the comfort of this Court's  
23 order regardless of whether a free-and-clear provision is  
24 actually necessary. And as Counsel for the entity that is  
25 usually the one looking at fraudulent transfers and other

1 bases to challenge transactions entered into by a debtor and  
2 certainly understand that if the debtors' financial distress  
3 raises questions about its solvency, those buyers certainly  
4 may not be at the table absent the prospect of a 363 order  
5 from this Court.

6                   Really importantly, and this was very much the  
7 focus of the beginning of the case and much of the  
8 committee's activities, the debtors needed to resolve the  
9 Karma litigation. That was an almost-billion-dollar  
10 potential claim against the estates and the committee thinks  
11 that it is not insignificant that, after three years of bare-  
12 knuckle litigation, a settlement was able to be reached only  
13 after bankruptcy was filed. And that potential 900-plus-  
14 million-dollar liability, which while it could have  
15 materialized absent the bankruptcy, would have reduced  
16 unsecured creditor recoveries to pennies on the dollar.  
17 Thankfully, that risk is behind us, but there are a lot of  
18 other issues facing these debtors that could impact creditor  
19 recoveries.

20                   The company was and is facing numerous shareholder  
21 lawsuits and an SEC investigation. As Mr. Ninivaggi  
22 testified, the debtors have worked diligently to settle those  
23 shareholder lawsuits, but as the committee only recently  
24 learned, those efforts have been unavailing. We also  
25 understand that the debtors' insurers have denied coverage.

1 So, as Mr. Lauria alluded to -- and this was really one of  
2 the focuses for the committee -- outside of bankruptcy, we  
3 would be facing competition from numerous claimants whose  
4 claims are subordinated in bankruptcy.

5 So this is really a little bit of an unusual case  
6 that in Chapter 11 could, and we believe will, hopefully,  
7 provide a full recovery too general unsecured creditors due  
8 to the Bankruptcy Code's waterfall provisions, including  
9 Section 510(b). But this company could well be insolvent  
10 outside of bankruptcy, putting creditor recoveries at risk.

11 As the Court knows, the committee has been  
12 singularly focused on getting unsecured creditors paid in  
13 full as quickly as possible and with as much certainty as  
14 possible. As Mr. Lauria noted, the committee has already  
15 begun negotiating the terms of a plan with the debtors, and  
16 our goal is to get to a consensual plan that pays unsecured  
17 creditors in full and allows them participation throughout  
18 that process. The committee believes that an expeditious,  
19 consensual plan process is the best path to get unsecured  
20 creditors paid in full.

21 Just to go back to Mr. Lauria's examples of what  
22 happens if this case does get dismissed, not only do all of  
23 the creditors who are going unpaid then after you -- well,  
24 consider at least suing to receive the monies that they're  
25 owed, but there's a pretty high probability that three of

1 them will figure out that they could band together and put  
2 these companies right back into bankruptcy involuntarily and,  
3 unfortunately, most likely on much worse terms, with the  
4 debtors having less cash, less of the likelihood of being  
5 able to sell their assets for significant value, and a likely  
6 worse outcome for all creditors.

7                   So, for the reasons that the debtors have stated,  
8 for the reasons expressed in the testimony of the debtors'  
9 witnesses, and those delineated in the committee's statement  
10 of position with respect to the Foxconn motion, the committee  
11 believes that at this point dismissal is not warranted, is  
12 not in the interest of creditors, and that this case should  
13 be allowed to progress under the Court's supervision. And of  
14 course, as Mr. Lauria said, if it goes off the rails, the  
15 Court will step in. Certainly the committee is keeping a  
16 close eye on it as well.

17                   THE COURT: All right, thank you.

18                   MS. KOVSKY-APAP: Thank you.

19                   THE COURT: All right.

20                   MR. SCHMIDT: Your Honor, may I be heard, please?

21                   THE COURT: Yes, Mr. Schmidt.

22                   MR. SCHMIDT: Yes. Good afternoon, Your Honor,  
23 Shai Schmidt, Glenn Agre Bergman & Fuentes, on behalf of an  
24 ad hoc group of shareholders of LMC.

25                   We support the debtors' objection to Foxconn's

1 motion to dismiss. We believe and, frankly, we think that  
2 the presentations today showed that there is substantial  
3 equity value that can be unlocked through the Chapter 11  
4 cases, including a streamlined sale process with this Court's  
5 oversight. So, for that reason, we agree with the debtors  
6 that the cases should remain in Chapter 11.

7 Thank you.

8 THE COURT: Thank you.

9 Anybody else?

10 (No verbal response)

11 THE COURT: Mr. Murphy, any response? You're  
12 still muted, double muted.

13 MR. MURPHY: I need a sign. Yes, I will endeavor  
14 to be very brief in response, maybe less than five minutes,  
15 maybe ten points.

16 As it relates to the consent to the sale, Your  
17 Honor, Foxconn was never asked. I don't -- I mean, it's just  
18 a question, do you consent to a sale process, sure.

19 As to the shareholder meeting and the fact that,  
20 you know, this bankruptcy process avoids the complexities  
21 associated with a shareholder meeting, I don't -- I submit  
22 that I'm not positive about this, but I don't think you can  
23 file for bankruptcy for purposes of trying to avoid a  
24 shareholder meeting. And I don't know if it's the ESOPUS  
25 Creek Value LP case or something else, I was trying to read

1 it quickly, but I just don't know that you can do that.

2 I do know, however, that another stated reason,  
3 the efficient disposition of its assets, the debtors'  
4 efficient disposition of its asset, under the Third Circuit's  
5 ruling in 15375 Memorial, the court said using Chapter 11 to  
6 facilitate distributions to creditors does not qualify as a  
7 good faith basis to file. Orderly distribution of assets is  
8 not a valid bankruptcy purpose. So I don't know that that  
9 gets the debtor there.

10 As it relates to the 510(b) subordination of  
11 securities claims, I mean, that's a tactical litigation  
12 advantage play, right? Not to make the argument for them,  
13 but that's exactly -- especially when the debtor is solvent,  
14 especially when the debtor should be operating out of court,  
15 they're filing for -- that's a tactical litigation advantage.

16 You know, I can't -- both the committee and the  
17 debtor keep talking about the multiple complex litigation and  
18 the numerous lawsuits, but it's pretty simple. It's Karma,  
19 which is gone; the securities class action, which has been  
20 stayed pending a ruling on the motion to dismiss; one is  
21 proceeding because -- and the debtor is not a defendant, but  
22 they have to provide some discovery after being compelled by  
23 a court; the derivative claims are all stayed and the SEC  
24 investigation, which the committee says they're diligently  
25 working to resolve these issues, five to six months to

1 respond to the SEC doesn't seem necessarily diligent to me.

2                   The board -- let's see, I've got to read this --  
3 ah, the board filed early and, if these cases are dismissed,  
4 we'll be right back. So if you look at the SGL case, in that  
5 case, the court says the attenuated possibility for filing is  
6 not enough to establish good faith. Early encouragement  
7 doesn't trump the need for a valid bankruptcy purpose, it  
8 just doesn't.

9                   The race to the courthouse, this is another one.  
10 This is -- I mean, this is -- like it's Bankruptcy 101, you  
11 just use these catchphrases. Karma, they were already at the  
12 courthouse, they've been there for two years. And oh, by the  
13 way, when the case was going to proceed to trial in the  
14 spring, they didn't file for bankruptcy. So, you know, there  
15 was no race -- that case was pending for a long time. Same  
16 with all the securities cases, the class action, the  
17 investigation, for years. Nobody was racing anywhere. The  
18 only person racing to the courthouse was the debtor and  
19 they're racing to the courthouse to spend money that they  
20 don't need to be spending. Candidly, I think, at the end of  
21 the day, the way this ends up, it's probably going to end up  
22 being Foxconn's money.

23                   The liquidation is contemplated in the Code. Yes,  
24 that's true, but -- and we've all done lots of cases where  
25 you do a 363 sale followed by a plan of liquidation, a

1 hundred percent true. The difference is, in those cases, the  
2 363 sale process made sense. You were either selling real  
3 assets or you were going to garner more value by virtue of  
4 that process than it costs to run it, or, potentially, more  
5 value than a bid that you received on the eve of the  
6 bankruptcy filing, which the investment banker actually never  
7 looked at.

8                   Let's look at Primestone. Primestone, to me, is  
9 now art; it's a piece of art because two people can look at  
10 it so differently.

11                  I mean, so it's a single-asset case, agreed. Few  
12 unsecured creditors. I don't know, I think yes. Mr. Lauria  
13 has been involved in some of the biggest cases known to  
14 humankind. In this case, I would say there's few unsecured  
15 creditors.

16                  No ongoing business, I think he used the qualifier  
17 limited. I mean, we've heard that the businesses, they're  
18 not manufacturing anything right now.

19                  Petition on the eve of foreclosure, I agree with  
20 him.

21                  A two-party dispute that can be resolved in  
22 pending state court action. I think if the hearings before  
23 this Court have shown you anything, Your Honor, is that this  
24 is a two-party dispute because they're yelling at us and  
25 we're yelling at them, and everybody else is just kind of

1 hanging out. I view it as a two-party dispute.

2 No cash or income. They have plenty of cash, way  
3 more than their liabilities.

4 No pressure from nonmoving creditors. There is no  
5 pressure from nonmoving creditors, there was none.

6 Previous bankruptcy petitions, correct.

7 Prepetition conduct was improper, we'll find out.

8 No possibility of reorganization, correct, it's --  
9 best-case scenario, it's a liquidation that's going to cost  
10 more than if we did this out of court.

11 The debtor formed immediately prepetition, no.

12 Debtor filed solely to create the automatic stay,  
13 that one kind of cuts both ways. I actually don't -- I could  
14 see that both ways.

15 Subjective intent of the debtor, I think I've made  
16 my position clear on that one.

17 Dismissal -- so I think what I'll end on is -- so,  
18 look, you know, there's this -- both the committee and the  
19 debtor have mentioned a parade of horribles if this case was  
20 dismissed. I've read more cases over the weekend than I want  
21 to ever read again and I don't remember seeing parade of  
22 horribles as being a valid bankruptcy petition. And if you  
23 can't justify your filing in the first place, then it  
24 shouldn't be in bankruptcy.

25 And if you look at the cash situation relative to

1 the liabilities -- and they talk about, well, if it's  
2 dismissed, then, you know, what are we going to do with all  
3 the trades? Well, you could pay them, you could pay your  
4 liabilities -- pay them all, pay everybody, and settle -- and  
5 settle it all, you're still going to have enough and you're  
6 going to do it more efficiently than what we're doing here  
7 today.

8           And what I've heard is everything we've talked  
9 about, the sales, the claims, you know, the trade was getting  
10 antsy. Do you know how you keep the trade from being antsy?  
11 You pay them. But nothing that I've heard today justifies  
12 this case being in bankruptcy. It could be done out of court  
13 just as easily as it could be done in court, but do you know  
14 what else? It could be done just as easily and efficiently  
15 in a Chapter 7.

16           That's all I have, Your Honor.

17           THE COURT: All right. Well, let me make my  
18 ruling.

19           I guess I'll go through the Primestone factors  
20 first, because you're right, everybody views these  
21 differently.

22           It's not a single-asset case. I don't think that  
23 the few unsecured creditors is really significant here. They  
24 may be few in numbers, but there are creditors with  
25 significant claims, and as noted by the debtor, the

1 securities litigation creditors, if successful, would have  
2 unsecured claims.

3 There are employees, and although the debtor has  
4 shuttered or partially shuttered its business, there is an  
5 effort to sell the business as a going-concern.

6 The petition was not filed on the eve of  
7 bankruptcy. I don't view this as a two-party dispute. It  
8 appears there is a significant dispute between Foxconn and  
9 the debtor, but the debtor faces disputes from a lot of  
10 people, including Karma, and although the debtor did not file  
11 on the eve of the Karma, the original Karma trial in April,  
12 it appeared that the Karma litigation was a significant  
13 pressure point for the debtor.

14 Yes, there's cash. There's no significant income  
15 and, in fact, the business was losing money and just not a  
16 viable business. I don't think, again, it's a -- I can't  
17 conclude that there was no pressure from non-moving  
18 creditors. I mentioned that.

19 There's no previous bankruptcy petition. I can't  
20 say that the debtors' prepetition conduct was improper.  
21 There's no allegation, for example, that management or the  
22 debtor itself was committing fraud or anything of that  
23 nature.

24 I'll address the no possibility of reorganization  
25 later.

1                   The debtor was not formed immediately prepetition.  
2 The debtor did not file solely to create an automatic stay  
3 and that relates to whether there's a two-party dispute and  
4 an effort just to stay litigation by the other party.

5                   But I think the broader implication of the Third  
6 Circuit cases like SGL and LTL, even, although LTL said that  
7 in it's a solvent debtor, you can't file bankruptcy unless  
8 you're in imminent financial distress. But LTL, also, the  
9 Third Circuit in LTL also acknowledged that the debtor does  
10 not have to wait until it is, in fact, out of cash to file  
11 bankruptcy and in its business judgment, can file earlier.

12                  And I think in this case, there was a valid  
13 bankruptcy purpose. That includes liquidations. As counsel  
14 for the debtor said, 1123(b)(4) specifically contemplates  
15 liquidations in Chapter 11. It doesn't mean a reorganization  
16 in the form of a plan of reorganization, reorganizing the  
17 debtor to continue to be held and owned by the debtor. It  
18 certainly contemplates a sale process that would allow  
19 another entity to take advantage of the value of the business  
20 as a going-concern through the sale process.

21                  And I don't read the cases to require that a sale  
22 process has to be started pre-bankruptcy in order for the  
23 debtor to pursue that in bankruptcy. And the debtor did  
24 state that part of the reason for filing bankruptcy was  
25 because they could not run a sale process without the consent

1 of Foxconn or the shareholders. So that, I think, was a  
2 legitimate purpose.

3                 In addition, on the comment about whether or not  
4 it's a legitimate purpose to create one forum to deal with  
5 creditors' claims, I know there's a lot of cases dealing with  
6 that in the context of mass torts. We're not dealing with  
7 mass torts here, and it's perfectly legitimate for a debtor  
8 who's facing half a dozen lawsuits by shareholders and a  
9 lawsuit by a company who asserted that the debtors' assets  
10 were owned by it and not the debtor, I think that's a  
11 legitimate purpose for filing bankruptcy, to try to resolve  
12 those in the context of one case.

13                 And the comment made by counsel for the debtor, as  
14 well as counsel for the Committee, that Section 510(b) will  
15 allow the general unsecured creditors to be paid more quickly  
16 because there is no concept of them being *pari passu* with  
17 shareholders who are suing for breach of sales agreements,  
18 over any other misrepresentations, et cetera, by the debtor,  
19 which is not true outside of bankruptcy.

20                 I, in contemplating this, I also want to state  
21 that it is not in the best interests of creditors in my mind,  
22 to either confirm or dismiss. Conversion would just require  
23 a Chapter 7 Trustee to be brought up to speed on the sale  
24 process, duplicate the debtors' efforts and, perhaps, not  
25 have access to the knowledge of the employees necessary to

1 liquidate these assets.

2           With respect to the shareholder meeting suggestion  
3 that it could have been held outside of bankruptcy to  
4 authorize the sale, I don't think that precludes the filing  
5 of a bankruptcy. I think that, although the stay does not  
6 preclude shareholders from seeking to have a shareholders'  
7 meeting and make changes such as in the Board, I don't think  
8 that addresses the question that's before the Court, so the  
9 reference to those cases, I don't think was really relevant.

10          Again, I find it as a legitimate bankruptcy  
11 purpose to purpose a sale, free and clear. Even though the  
12 debtor does not have liens, there is value to a court order  
13 that allows a sale to close promptly without the possibility  
14 of an appeal and without, perhaps, the possibility or  
15 successor or other creditor claims that are against the  
16 debtor remaining against the buyer.

17          In addition, the ability of a debtor to assume and  
18 assign contracts in contemplation or as part of a sale is a  
19 legitimate bankruptcy purpose. So, I'm going to deny the  
20 motion to convert or dismiss at this time and see if the  
21 debtor can pursue this.

22          There's always the ability of the Court to take  
23 action if anything changes, but at this stage, I think the  
24 debtor has a legitimate reason to pursue the course of action  
25 it is on and does not mandate dismissing this case.

1           All right. Can I have a form of order submitted  
2 under certification of counsel?

3           MR. LAURIA: Absolutely, Your Honor. Yes, Your  
4 Honor.

5           THE COURT: Okay. Then, we'll stand adjourned.

6           MR. ZAKIA: Your Honor?

7           THE COURT: Mr. Zakia, you have something else?

8           MR. ZAKIA: I had one cleanup item for your  
9 docket.

10          We had filed a motion to seal one exhibit at  
11 Docket 321. We came to an agreement with Foxconn over the  
12 weekend that that did not actually need to be filed under  
13 seal, so we're going to withdraw the motion to seal and just  
14 file the exhibit publicly.

15          THE COURT: Okay.

16          MR. WHALEN: Yes, Your Honor. No objection from  
17 Foxconn. I think you actually heard all the material terms  
18 of that exhibit today, so...

19          THE COURT: Anyway. All right, good.

20          MR. ZAKIA: Thank you.

21          THE COURT: We'll stand adjourned, then.

22          COUNSEL: Thank you.

23          (Proceedings concluded at 2:15 p.m.)

24

25

## CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling August 28, 2023

8 William J. Garling, CET-543

August 28, 2023

8 William J. Garling, CET-543

## 9 Certified Court Transcriptionist

10 | For Reliable

11

12 | /s/ Tracey J. Williams

August 28, 2023

13 | Tracey J. Williams, CET-914

14 | Certified Court Transcriptionist

15 | For Reliable

16

17 | /s/ Coleen Rand

August 28, 2023

18 Coleen Rand, CET-341

19 | Certified Court Transcriptionist

20 | For Reliable

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